IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-221

JACK NATHAN, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NATHAN LEWIN
JAMIE S. GORELICK
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

JACK NATHAN, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is not yet reported. It is reproduced at Appendix A (pp. 1a-9a, *infra*). No opinion was filed by the district court.

JURISDICTION

The opinion and judgment of the court of appeals were filed on June 16, 1976. A timely petition for rehearing and suggestion for rehearing *en banc* were filed on June 29, 1976, and were denied on August 6, 1976 (Appendix B, p. 10a, *infra*).

QUESTIONS PRESENTED

1. Whether the rule applied in the Second Circuit—that a theory of defense must be "*sufficiently* raised in the evidence" before it warrants a jury instruction at the defendant's request—sufficiently protects a criminal defendant's right to a fair trial as contrasted with the rule in other circuits that requires the giving of a requested instruction unless the record is "wholly devoid" of evidence supporting the theory of defense.

2. Whether petitioner was denied his right to confront the witnesses against him when the trial judge prevented defense counsel from impeaching a prosecution witness by playing to him a tape recording of a portion of a conversation between the witness and the petitioner which conflicted with the witness' sworn testimony.

STATEMENT

Petitioner was convicted, after a trial by jury, on four counts of tax evasion for the years 1967 to 1970 and was sentenced to serve concurrent nine-month prison terms and to pay a total fine of $40,000. A major part of the prosecution's proof related to the allegation that the petitioner had, during the years in question, cashed checks of his family-owned collection agency at leading hotels in New York City which were clients of the agency and had put the funds "right into [his own] pockets." Credit managers of the New York Hilton, Waldorf-Astoria and St. Moritz Hotels testified as prosecution witnesses that they had authorized the cashing of the checks in question, and they were cross-examined as to whether petitioner had used the funds in entertaining them and other business contacts.

Two of the three credit managers acknowledged receiving payments from petitioner. The manager for the Waldorf-Astoria, Joseph Mazzurco, admitted that he received substantial cash payments from petitioner whenever the hotel was given a statement, and he also testified that the giving of such gratuities was a "practice" or "custom" in the collection business (Tr. 153-166).[1] Another credit manager, Leonard J. Groppe (employed by the St. Moritz Hotel) reluctantly admitted that he had received gifts at holidays (Tr. 111-112), but he otherwise denied having received payments from petitioner.

In fact, Groppe had falsely told the Internal Revenue Service, in order to explain certain payments that had been made to him by petitioner, that he had independently done collection work for petitioner. Defense counsel had in his possession a tape recording of a conversation between Groppe and petitioner in which Groppe had admitted that this statement to the Internal Revenue Service "wasn't true." When counsel sought to play the tape recording to Groppe during cross-examination to contradict Groppe's square denial (Tr. 127), the jury was excused at the prosecutor's request, and the court and counsel heard the tape several times. Since only a portion of the conversation was recorded, the trial judge excluded the evidence, stating that he would permit it to be presented only "if during the defendant's case you get this straightened out" (Tr. 135). On subsequent occasions during the trial, when the question was raised again, the trial judge stated that he would require "a proper foundation" if the recording were played during the defense case (Tr. 263), and that he did not see "what rele-

[1] "Tr." refers to the trial transcript.

vance" the taped conversation had to the issues at trial (Tr. 577). Since the defense waived the right to present any evidence, the recording was never played. The jury, however, requested the tape during its deliberations and was told it had never been introduced into evidence (Tr. 734).

Asserting that funds obtained when the checks were cashed had been used for business purposes as Mazzurco had testified, petitioner's counsel requested the trial judge to instruct the jury on this theory of defense. Two instructions in this regard were offered, and the judge denied both on ground that it was a "question of circumstantial evidence which [the jury] can consider" (Tr. 603-604).[2]

---

[2] The requested instructions read as follows:

Request No. 10

In order for you to find that Nathan, Nathan & Nathan, Ltd. improperly deducted as expenses on its tax returns for 1967-1970 the corporate checks the defendant cashed at the Waldorf Astoria, New York Hilton, Statler-Hilton and the St. Moritz, and that the defendant should have reported on his individual income tax returns for 1967-1970 the total amount of those checks cashed in those years, as claimed by the Government in Counts 1, 2, 3, and 4 of this indictment, the Government must prove beyond a reasonable doubt that the defendant did in fact receive the cash from those checks, that the defendant did not in fact spend or use said sums of money for the benefit of the corporation, that the defendant derived some individual economic benefit from the cash received, and that the defendant's conduct in this regard was motivated by a specific intent to cheat the Government of taxes.

Request No. 11

There has been evidence that the defendant paid Mr. Mazzurco, the credit manager at the Waldorf Astoria Hotel, which was a client of Nathan, Nathan & Nathan, Ltd. for said client, and that such payments were a common practice by companies engaged in collecting delinquent accounts for the Waldorf Astoria.

Consequently, if you should find that the checks which the defendant cashed at the Waldorf Astoria, New York Hilton, St. Moritz, and Statler-Hilton, were paid out for the purpose of assuring a continued flow of business from his clients, whether in the form of pay-offs, gratuities, or kickbacks, then such payments cannot be considered as additional income to the defendant as charged in Counts 1-4, inclusive, of the indictment because they are deductible as ordinary and necessary expenses notwithstanding their misclassification in the books and records of the corporation as refunds.

In the middle of its deliberations, the jury returned with a question relating to the cashed checks, to which the judge replied by asserting that the prosecution's theory was that petitioner had used the funds "for his own purposes" (Tr. 736). Defense counsel again noted that there was proof that the funds had been used for corporate purposes, but the trial judge refused to correct his instructions (Tr. 739).

The court of appeals rejected the argument that a valid theory of defense had been kept from the jury by asserting that Mazzurco's testimony explained "no more than one-sixth of the cash proceeds obtained by Nathan for the checks" (p. 5a, *infra*). Accordingly, the court concluded, "the defense that the check proceeds were used to pay legitimate business expenses was not *sufficiently* raised in the evidence to require the trial court to instruct the jury on this possible defense" (p. 5a, *infra*; emphasis added). The court ignored Mazzurco's testimony that what had been done for him represented a "practice" or "custom" in the trade, which would have provided a basis for a much larger total of payments.

The court of appeals also rejected the contention based on exclusion of the tape recording on the ground that the recording was only "temporarily excluded . . . pending proper identification of the scope and contents of the tape" (p. 6a, *infra*). The failure to make a "subsequent offer" was said to make the original exclusion "harmless" (p. 7a, *infra*).

REASONS FOR GRANTING THE WRIT

1. The quantitative standard applied to the defense evidence by the Court of Appeals for the Second Circuit in this case conflicts with the standard which has been applied in similar circumstances in the Fifth, Seventh and District of Columbia Circuits. Cases in the latter circuits have recognized that a defendant is entitled to have the jury instructed on a theory of defense "when properly requested by counsel and when the theory is supported by *any* evidence." *United States* v. *Mathis,* D.C. Cir. No. 75-1373 (May 18, 1976) (emphasis added). As the Court of Appeals for the Fifth Circuit, noted in *United States* v. *Young,* 464 F.2d 160, 164 (5th Cir. 1972) quoting from the decision of the District of Columbia Circuit in *Tatum* v. *United States,* 190 F.2d 612, 617 (1951):

> . . . in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility.

Accord, Perez v. *United States,* 297 F.2d 12 (5th Cir. 1961); *United States* v. *Clancy,* 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds,* 365 U.S. 312 (1961); *Womack* v. *United States,* 336 F.2d 959 (D.C. Cir. 1964); *Brooke* v. *United States,* 385 F.2d 279, 284 (D.C. Cir. 1967).

The only proper basis for refusing to instruct on a theory of defense is when the "record is *wholly devoid* of any evidence in support of the instruction." *United States* v. *Achilli,* 234 F.2d 797, 808 (7th Cir. 1956), *aff'd,* 353 U.S. 373 (1957) (emphasis added). Even on the court of appeals' view of the record—with which we strongly disagree[3]—it cannot be said that it was "wholly devoid" of evidence in support of the defense that the funds from the cashed checks were used to insure a steady flow of clients to petitioner's firm. The unique standard applied by the Second Circuit in this case deprived the defendant of the right to have the jury consider evidence of his innocence. The conflict as to the proper standard among the circuits—which resulted in petitioner's conviction—should be resolved in this case.

2. When the Second Circuit approved of the refusal to permit Groppe to be cross-examined with a tape of a portion of a conversation between the witness and the petitioner, its ruling conflicted with that of the Third Circuit in *United States* v. *Segal,* Nos. 75-1534 and 75-1539, decided February 6, 1976, reprinted as Appendix C hereto. In *Segal,* the Third Circuit recognized that "the right of cross-examination is of constitutional dimension and may not be denied" (p. 16a,

---

[3] Apart from Mazzurco's testimony regarding the "practice" and "custom" in the industry and the inference that could be drawn from Groppe's testimony, there was also proof that petitioner's reported "entertainment" expenses averaged only $1300 per year, less than 5 percent of what testimony indicated would be reasonable for a business this size (Tr. 277). This made it most likely that the cash obtained from the checks had been used for business purposes.

infra), and it overruled a trial court's decision preventing the playing of a portion of a tape recording that had not been heard during the direct testimony of a government witness.

In *Segal,* as in this case, the court of appeals viewed the trial court's purpose as being to avoid delays (p. 17a, *infra*), but it disallowed that objective to the extent it conflicted with the telling impeachment that a replay of a witness' own voice might produce (p. 16a, *infra*):

> [I]f a matter has been raised on direct examination, generally cross-examination must be permitted. More over, questioning of the witness which tests his perception, meaning or otherwise tends to discredit him is proper.

It is no ground for limiting the right of cross-examination that only a portion of a document or conversation is available. *See United States* v. *Schanerman,* 150 F.2d 941, 944 (3d Cir. 1945). It is well-settled that "any writing or thing may be used to stimulate and revive a recollection (3 Wigmore, *Evidence* §758 (1970)), and this rule includes a cross-examiner's use of prior inconsistent statements to impeach a hostile witness (*Id.* at §764). As a result of the trial judge's failure to appreciate the extent of petitioner's right to cross-examination, a critical piece of evidence—whether Groppe lied in denying that he had received gratuities from petitioner—was kept from the jury.

CONCLUSION

This case presents two important issues concerning the fair and proper conduct of a criminal trial. These issues have been decided by the Court of Appeals for the Second Circuit contrary to principles enunciated in other courts, bringing great harm to the petitioner. This petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
JAMIE S. GORELICK
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D. C. 20037

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 964—September Term, 1975.

(Argued March 25, 1976 Decided June 16, 1976.)

Docket No. 75-1421

UNITED STATES OF AMERICA,

Appellee,

v.

JACK NATHAN,

Appellant.

Before:

LUMBARD, OAKES and TIMBERS,

Circuit Judges.

Appeal from a judgment of conviction under 26 U.S.C. § 7201 for evasion of income taxes, entered on December 8, 1975, in the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge*. Appellant argues that (1) the evidence of willfulness was insufficient; (2) an erroneously excluded tape of a conversation impaired development of a critical theory of the defense; (3) introduction of large charts summarizing portions of the prosecution's evidence without appropriate cautionary instructions was prejudicial error; and (4) participation in the interrogation of witnesses by the trial judge indicated to the jury that the judge held a bias in favor of conviction in this case.

Affirmed.

NATHAN LEWIN, MILLER, CASSIDY, LARROCA & LEWIN, Washington, D.C. (Jamie Gorelick, Miller, Cassidy, Larroca & Lewin, Washington, D.C., on the brief), *for Appellant.*

FRANK H. WOHL, Assistant United States Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Alan Levine, Lawrence B. Pedowitz, John C. Sabetta, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from a judgment of conviction entered in the United States District Court for the Southern District of New York, before Dudley B. Bonsal, *Judge.* After a six-day trial, the appellant, Jack Nathan, was found guilty on four counts of evasion of personal income taxes, 26 U.S.C. § 7201,[1] and sentenced to concurrent terms of nine months' imprisonment and a fine of $10,000 on each count.

The tax evasion scheme proved a trial was simple and direct in its conception. The appellant owned and operated a bill collection agency. Nathan, Nathan & Nathan, Ltd., in New York City. The agency business was collection of delinquent customer accounts owed to hotels and other clients. The collection receipts obtained by the agency were deposited in full in the firm's own bank account. A fee of approximately 35 per cent was retained by appellant's agency, and the balance was remitted to the client by a check carried on the firm's books as a "refund." The Government proved at trial that the firm, at appellant's direction, employed two devices to understate

[1] 26 U.S.C. § 7201 provides that:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provide by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

its income[2]: (1) "refund" checks written to clients were carried on the books as expenses, even though in many cases the checks had not been cashed three or more years after they were allegedly mailed to the clients; (2) checks made out to client hotels which were not "refunds," but for which the appellant had received cash from the hotels, were treated as "refund" checks on the agency's books and charged as expenses. By the end of 1970, approximately $50,000 of income had been concealed in stale "refund" checks, and during the period of 1967 through 1970, approximately $36,000 of cash was siphoned out of the agency through Nathan's cashing of putative "refund" checks at the client hotels.

Appellant raises the following claims at this appeal: (1) the evidence that appellant "willfully" evaded payment of his income taxes, *see* note 1 *supra,* was insufficient to warrant submission of the case to the jury; (2) the defense was prejudiced by an erroneous exclusion of a taped conversation tending to show that the proceeds of checks cashed by appellant at client hotels were used to pay "gratuities" to the credit managers at those hotels; (3) use by the Government of charts which summarized portions of the evidence, without appropriate cautionary instructions, was prejudicial error; and (4) participation in the interrogation of witnesses by the trial judge indicated to the jury that the judge was biased in favor of conviction. We reject each of these arguments and affirm the judgment of the trial court.

There is ample evidence of appellant's willful evasion of taxes to support the conviction. An accountant formerly

[2] Since the collection agency was organized as a Subchapter S corporation during the period covered in the indictment, the profits of the firm constituted income to the appellant. 26 U.S.C. § 1373. Therefore, his willful participation in a scheme to understate the agency's profits constitutes evasion of his personal income taxes under 26 U.S.C. § 7201, *see* note 1 *supra.*

employed by appellant, Allan Edwards, testified that he had informed Nathan that the stale "refund" checks should be written off the agency's books and that as an accountant he could not prepare the appellant's tax returns unless the appropriate adjustment were made. Nathan then fired Edwards, allegedly for cause,[3] though the jury could well have believed Edwards was fired because of appellant's desire to conceal his income. A second accountant, Sanford Katz, hired to succeed Edwards, also testified that appellant was aware of the mounting sum of stale "refund" checks carried on the agency's books. From this evidence the jury could well conclude that appellant willfully engaged in conduct which concealed his income. Nathan did not testify and the defense presented no witnesses.

The evidence of willful evasion of taxes with regard to appellant's cashing of "refund" checks at client hotels is equally forceful. These amounted to 100 checks aggregating $36,120 during the tax years in question, 1967-70. The stubs for and the face of these checks looked just like genuine "refund" checks (although the reverse side of the checks carried a different endorsement). Both Edwards and Katz had been led to believe that these checks were "refund" or "client" checks, and appellant never gave contrary instructions, told his accountants that he was obtaining cash for the checks at the client hotels, or made any other entries on the stubs or face of the checks which he generally drew himself. This circumstantial evidence of willful evasion of taxes was sufficient to allow the case to go to the jury. The appellant has argued that the Government failed to show that Nathan did not use the cash proceeds of these checks for business purposes (*i.e.*, "gratuities" and entertainment for client credit

[3] Appellant claims that Edwards was fired because he had failed to prepare Nathan's income tax returns on time and had assigned junior employees to work on the account rather than doing the returns himself.

managers). While "the ultimate burden of persuasion remains with the Government" on the issue whether *net* taxable income was understated by the taxpayer, *United States* v. *Leonard*, 524 F.2d 1076, 1083 (2d Cir. 1975), *cert. denied*, 44 U.S.L.W. 3621 (U.S. May 4, 1976), we agree with Judge Coffin that "[t]he applicable rule here is that uniformly applied in tax evasion cases—that evidence of unexplained receipts shifts to the taxpayers the burden of coming forward with evidence as to the amount of offsetting expenses, if any." *Siravo* v. *United States*, 377 F.2d 469, 473 (1st Cir. 1967).

In this case, moreover, as in *United States* v. *Leonard*, *supra*, the defense that the check proceeds were used to pay legitimate business expenses was not sufficiently raised in the evidence to require the trial court to instruct the jury on this possible defense. The only evidence regarding cash gratuities introduced at trial was from Joseph Mazzurco, the credit manager at the Waldorf Astoria, who admitted receiving between $200 and $500 in cash per year from appellant. No nexus between these payments and the proceeds of the challenged checks appears in the record; even if it did appear, the sums involved fall far short of explaining any material portion of the approximate $9,000 cash per year appellant was obtaining out of agency earnings through the cashing of the bogus "refund" checks. All of the checks were cashed at three New York hotels. Even assuming that each of the credit managers at these hotels were receiving cash "gratuities" of $200 to $500 per year from appellant, this accounts for no more than one-sixth of the cash proceeds obtained by Nathan for the checks. There is not the slightest hint in the record as to a legitimate business usage for the remaining bulk of the cash proceeds of these checks. In these circumstances, it was proper for the trial court to refuse to instruct the jury that if the check proceeds had been wholly paid out for business purposes there was no evasion of income. *See United States* v. *Leonard*, *supra*;

United States v. *Gross*, 286 F.2d 59, 61 (2d Cir.), *cert. denied*, 366 U.S. 935 (1961).

Appellant claims that a taped conversation between appellant and Leonard Groppe, the credit manager at the St. Moritz Hotel, indicating receipt of gratuities by the latter, was improperly excluded. However, the tape was only temporarily excluded during appellant's cross-examination of Groppe pending proper identification of the scope and contents of the tape. It is quite plainly within the trial court's discretion to avoid delays in the trial by requiring counsel who does not have his evidentiary material in workable order to proceed with examination of a witness rather than to bog down the trial by a lengthy, awkward in-court attempt to straighten matters out, here selecting portions of a tape for playback.[4] The defense

[4] When the defense offered the tape in evidence it was unable to identify the portion of the tape it intended to play back. The following colloquy took place at the side bar:

The Court: What's the date of the tape?

Mr. Pender: I have to check it. I have to check it. I have to find out.

The Court: Find out.

(Pause.)

Mr. Bender: 5/21/74.

The Court: And who initiated the call?

Mr. Bender: I think he said that he called.

The Court: But I don't know if that's the one that you have the tape on.

Mr. Bender: I think he said he did.

The Court: You must know who initiated the call.

Mr. Bender: I wish I did. I can find out.

(Pause.)

Mr. Bender: Mr. Nathan says that the witness called him.

[Two portions of the tape were then played.]

The Court: That's what I am looking for. Where is the beginning?

was invited to offer the tape again whenever it had ascertained what portions of what conversations on the tape it sought to have admitted in evidence. The defense's omission to make a subsequent offer deprives it of grounds for attacking the trial court ruling on this appeal. Any error, had there been one, was rendered harmless by the open opportunity to offer the tape once it was properly prepared for use. *See United States* v. *Badalamente*, 507 F.2d 12, 22 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975).

Appellant objects to the Government's use of two large, "outsized" charts to summarize the evidence concerning the number and amount of the various checks improperly charged against the agency's income. Admission of charts for the purpose of summarizing facts contained in other exhibits was entirely proper. *United States* v. *Silverman*, 449 F.2d 1341, 1346 (2d Cir. 1971), *cert. denied*, 405 U.S.

The Defendant: Excuse me, your Honor, I believe at the end of this we will go open [sic] to the other. I believe so. I haven't played these things——

The Court: You think this is a different conversation?

The Defendant: Yes, sir.

[Tape played.]

The Court: I am trying to get the beginning of the one that you had before. You don't know?

The Defendant: No, I don't know.

The Court: Gentlemen, what I think I am going to do with this thing, I am not going to put this on now. I will let you cross-examine him about the content and if during the defendant's case you get this straightened out, you find out what conversations are what and who originated them and you will want to put them on in the defense case, that will be all right, and if it is necessary to recall the witness we can do that, but I think on the present state I am not going to permit this to be presented to the jury now.

918 (1972).[5] Appellant complains, however, that the trial court failed to instruct the jury that the charts were not themselves evidence and should not be considered as such. At the time the first of the two charts was introduced, however, Judge Bonsal instructed the jury that it was

> merely a chart . . . which contains the information as to these various checks, Exhibits 31 to 145. The checks themselves are in evidence, the chart is merely to help you as a pictorial representation.

This instruction conveyed to the jury the substance of the cautionary instruction required by *Holland* v. *United States,* 348 U.S. 121, 128 (1954), and *United States* v. *Goldberg,* 401 F.2d 644, 647-48 (2d Cir. 1968), *cert. denied,* 393 U.S. 1099 (1969). It is true that while the judge indicated that in his final charge he would again caution the jury as to the limited function of the charts, he inadvertently neglected to do so.[6] But viewing the entire trial as a whole, it is apparent that this inadvertence did not prejudice appellant, a conclusion fortified by the lack of a specific contemporaneous objection at the close of the court's charge. *See* Fed. R. Crim. P. 30; *United States* v. *Bermudez,* 526 F.2d 89, 97 (2d Cir. 1975).

The final argument raised is that Judge Bonsal's participation in the examination of several witnesses betrayed

---

[5] Appellant claims that the charts used by the Government were prejudicially large. Their size, three feet by seven and one-half feet, was no greater than necessary to convey the information (dates, amounts, exhibit numbers, etc.) on the 115 checks referred to in GX 336 or the 138 stubs referred to in GX 338, and the type size of less than one inch is plainly proper in the light of the requirement that the jury be able to read it. We take it that juries are not so unsophisticated as to be likely to be misled by the size of a courtroom chart, in any event.

[6] Both sides had requested the charge and Judge Bonsal had indicated that a charge to that effect would be made.

a prejudice favoring conviction which deprived appellant of a fair trial. Appellant has indicated 17 instances where the trial court intervened in the defense's examination of witnesses to ask clarifying questions. The Government has also cited several places in the record where Judge Bonsal raised objections on behalf of the defense, and interrupted or curtailed the Government's examination of witnesses. We are satisfied upon examination of the entire record that Judge Bonsal conducted the trial fairly and impartially.

Judgment affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of August, one thousand nine hundred and seventy-six.

Present: HON. J. EDWARD LUMBARD, HON. JAMES L. OAKES, HON. WILLIAM H. TIMBERS, *Circuit Judges.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK NATHAN,
Defendant-Appellant.

No. 75-1421

A petition for a rehearing having been filed herein by counsel for the appellant, Jack Nathan.

Upon consideration thereof, it is
Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

by: EDWARD J. GUARADO
Senior Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1534
No. 75-1539

UNITED STATES OF AMERICA,
Appellee

v.

MORRIS SEGAL and GEORGE HENRY HURST, JR.
George Henry Hurst, Jr., *Appellant* in 75-1534
Morris Segal, *Appellant* in 75-1539

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 75-85)

Argued February 6, 1976

Before: SIETZ, *Chief Judge,* VAN DUSEN and WEIS, *Circuit Judges.*

Opinion of the Court

(Filed April 7, 1976)

WEIS, *Circuit Judge.*

Defendants were tried jointly and convicted of conspiracy and bribery of a public official in violation of 18 U.S.C. §§ 371 and 201(b)(2), arising out of the payment of money to an Internal Revenue agent to falsify a tax liability. We reverse the conviction and remand for a new trial because the voir dire examination of the jury

panel and the cross examination of the prosecution's witnesses were improperly restricted.

Defendant Segal was a certified public accountant who represented the defendant Hurst during an audit of his tax returns by Internal Revenue Agent Edward Sigmond. During the period from June to December, 1974, Sigmond contacted Segal on a number of occasions. At their first meeting, Segal intimated that he might offer Sigmond a bribe, a matter which the agent reported to the Inspection Service. Thereafter, on visits to Segal's office, Sigmond wore a body recorder. He also recorded a number of telephone conversations with Segal and one with Hurst.

At the trial, Sigmond was the principal government witness. He testified that Segal offered to obtain $20,000.00 from Hurst, of which $15,000.00 would go to the agent in return for submitting a false audit report, and the remaining $5,000.00 would be retained by the C.P.A. In December of 1974, Sigmond received $5,000.00 from Hurst through Segal, with a promise that the remainder would follow. On January 7, 1975, Sigmond telephoned Hurst and recorded the conversation in which Hurst admitted providing the bribe and promised to pay the amount still due. Hurst was arrested the following day and gave a statement to Internal Revenue officials admitting his participation and also implicating Segal.

On appeal, both defendants claim that the voir dire of prospective jurors was unduly limited and that the cross-examination of Sigmond was improperly restricted. Hurst also contends that because a redacted version of his confession presented an erroneous view of his part in the affair, a severance was required.

I

Counsel for the defense submitted proposed voir dire questions designed to supplement the court's inquiries.

Segal's attorney filed suggested questions before the date set for jury selection and Hurst's counsel tendered others after the court had concluded the standard interrogation. The judge began the voir dire by asking each venireman to state his occupation for the preceding five years and that of his spouse or other employed person in the household. Thereafter, general questions were propounded to the panel, including the following:

> "Is or has any member of your immediate family ever been an official or employee of the United States Government?"

Seven members of the panel raised their hands indicating an affirmative answer to this question. The next query was:

> "Are you or have you ever been an official or employee of the United States Government?"

Seven persons indicated an affirmative answer to this question. Twelve of the 31 veniremen answered at least one of these two questions affirmatively.

After addressing further general questions to the panel, the court refused to ask the more specific questions submitted by defendant Segal. Two of these would have inquired whether any member of the panel or his immediate family was employed by the Internal Revenue Service or similar departments of the city or state. Hurst's counsel asked that the prospective jurors, who had indicated employment by the federal government, be asked what specific activities they had in their last employment. That request was also declined.

In federal cases, it is approved procedure for the trial judge to question the veniremen on voir dire. This practice expedites the selection of an impartial jury and prevents the excessively lengthy void dire proceedings which

occur in some jurisdictions. The Bench Book, published under the auspices of The Federal Judicial Center, contains a list of suggested questions and apparently was the source of most of the queries utilized by the judge in this case. While these questions are adequate in most instances, situations do arise where supplemental inquiries should be made.

The trial judge has wide discretion to determine the scope and content of the voir dire. *See United States* v. *Napolcone,* 349 F.2d 350 (3d Cir. 1965); FED. R. CRIM. P. 24(a). But the parties have the right to some surface information about prospective jurors which might furnish the basis for an intelligent exercise of peremptory challenges or motions to strike for cause based on a lack of impartiality. *Ristaino* v. *Ross,* 44 U.S.L.W. 4305, 4308 n.9, (U.S. March 3, 1976); *Kiernan* v. *Van Schaik,* 347 F.2d 775 (3d Cir. 1965). *See also United States* v. *Robinson,* 485 F.2d 1157 (3d Cir. 1973); *United States* v. *Poole,* 450 F.2d 1082 (3d Cir. 1971). *Cf. United States* v. *Wooten,* 518 F.2d 943 (3d Cir. 1975).

Because of the circumstances in this case, the defendants would reasonably need to know whether any member of the panel or any person in his family had ever been employed by the Internal Revenue Service. The possibility of lingering loyalty to the service, friendship of persons still employed there, or knowledge of agency procedures are all factors which counsel would weigh in deciding whether to challenge. Since it was known that a number of veniremen had been employed by the government, the requests by defense counsel were reasonable and should have been honored. As the Court said in *United States* v. *Wood,* 299 U.S. 123, 134 (1936):

> "In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental

> activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him."

Similarly, past employment by the specific agency prosecuting the case is a matter which should be explored upon a party's request. The refusal to do so requires that a new trial be granted.

II.

Since upon a retrial it is likely that the scope of cross-examination will again become an issue, we shall discuss it at this time.

Agent Sigmond testified about the several conferences and telephone conversations he had with Segal from May to December, 1974. Excerpts from some of the recordings were played for the jurors who were supplied with transcripts of these conversations for use while listening to the tapes. Since some of the recordings, particularly those of all-day conferences, were quite lengthy, some editing was necessary. Obviously, much of the material was inconsequential, and playing all of it would have unduly prolonged the trial and aided no one.

In an effort to keep the trial moving, the judge ruled that on cross-examination defense counsel would not be permitted to replay tapes which had been heard during direct examination. He directed that cross-examination be conducted by use of the transcripts. Defense counsel assert that they wished to replay portions of the tape rather than relying on the transcripts because voice inflections were important.

If in any specific instance this contention should appear to be valid, the court should consider the advisability of allowing replay. In general, however, we cannot find error in the court's suggestion that the transcript be used

in reviewing material which had once been played.[1] The court's policy offered a practical way to eliminate the delays which necessarily accompany the playing of selected excerpts from lengthy and unindexed tapes.

However, the court also prohibited defense counsel from using transcripts or playing parts of a recording which had not been heard during direct examination. This restriction was based on the premise that cross examination should not exceed the scope of direct and that the defendants were free to present the proffered evidence in their own case. We think this limitation unduly narrowed the scope of cross examination and hindered proper presentation of the defense case.

Federal Rule of Evidence 611(b) provides that cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. While the trial court has wide discretion to prevent repetition, harrassment of the witness or production of irrelevant material, the right of cross-examination is of constitutional dimension and may not be denied. *Davis* v. *Alaska,* 415 U.S. 308 (1974). Therefore, if a matter has been raised on direct examination, generally cross-examination must be permitted. Moreover, questioning of the witness which tests his perception, memory, or otherwise tends to discredit him is proper. *Davis* v. *Alaska, supra.*

One of defendants' complaints is directed at an incident which occurred during the cross-examination of Agent Sigmond. He had testified about statements made during a conference with Segal on September 16, 1974. Although Sigmond used a body recorder on that date and

[1] Defendant Hurst was denied the opportunity to replay a recording of a telephone conversation of January 7, 1975. Apparently, the purpose was to show that the beginning of the call had not been recorded. However, on cross-examination that fact was admitted by the agent and we do not think the trial judge erred in refusing to play the recording a second time.

a transcript had been prepared, the tape was not played to the jury during the direct examination. On cross-examination, defense counsel's attempts to use either selected portions of the tape or the transcript for that day were blocked by the court. Counsel for Segal explains in his brief:

> ". . . the meeting of September 16, 1974 and the tape recorded conversations arising thereform became crucial to the defense in their endeavor to show that, in fact, at no time during this meeting did the defendant attempt to or offer to Agent Sigmond a bribe in the form of money or gratuities and that rather, certain conversations recorded on that day indicated that Agent Sigmond was himself attempting to solicit a bribe from the defendant."

Since the court did permit some inquiry about that meeting and restricted counsel only on the use of the recording, it seems that the difficulty centered on the question of what constituted the scope of direct examination. In our view, the scope is to be measured by the subject matter of the direct examination rather than by specific exhibits which are introduced at that time. *See* Federal Rule of Evidence 611(b).

Moreover, the fact that some of the points which defendant sought to explore could have been introduced in the defense case is not determinative. That specific evidence could have been a part of the defense does not preclude its development on cross-examination if the prosecution makes the subject matter part of its direct testimony. *United States* v. *Lewis,* 447 F.2d 134 (2d Cir. 1971).

The ruling of the trial court in this instance was erroneous because it unduly limited cross-examination.[2]

[2] We recognize that the playing of excerpts from tapes can lead to delays during the trial. However, a delay may be obviated through counsel's use of cassettes or tapes prepared in advance

III.

After his arrest, Hurst gave a statement to Internal Revenue officials in which he said that Segal had contacted him about the tax deficiency and had indicated $10,000.00 in cash was needed to pay somebody for reduction of the tax. Thereafter, Mrs. Hurst took $5,000.00 in small bills to Philadelphia where she gave them to Segal's business partner. Hurst's statement was redacted by deleting Segal's name in an effort to avoid the problem presented by *Bruton* v. *United States,* 391 U.S. 123 (1968).

On cross-examination of the I.R.S. official to whom the statement had been given, Hurst's counsel sought to establish entrapment by bringing out the references to Segal. The court sustained Segal's objection to the questions on this point and denied Hurst's motion for severance.

The grant of severance is a matter within the discretion of a trial court and involves the balancing of a number of considerations. Foremost of these is prejudice to the defendant. That, however, should be real, not fanciful. It must be considered together with the desirability of joint trials, particularly those involving a legitimate conspiracy count such as was present here. The circumstances of each case will control the decision.

The references which Hurst's lawyer sought to elicit from the witness were arguably within the scope of *Bruton.* But considering the overwhelming nature of the evidence, mention of Segal's name might have been harmless beyond a reasonable doubt. *See Harrington* v. *California,* 395 U.S. 250 (1969). After listening to Sigmond's tape, the jury was well aware that Segal had acknowledged contacting Hurst in December. Similarly, it is difficult to conceive the existence of any doubt that the

---

which contain only the relevant portions of the conversations and are adequately indexed.

$5,000.00 in cash had been delivered to Segal because the recorded conversation between him and Sigmond as they counted the money had been played for the jurors. Nevertheless, the trial judge's conclusion that *Bruton* required editing of Hurst's statement was certainly not incorrect.

The redaction, however, raises another issue. The case at bar is unusual in that the objection to admission of the redacted confession comes not from a co-defendant who would be implicated by hearsay evidence, but from the defendant who gave the statement. He does not assert error in inclusion as a co-defendant usually does but, rather, complains of exclusion. Hurst alleges prejudice because he could not produce evidence which would have been admissible on cross-examination but for Segal's objection based on lack of confrontation.

Essentially, then, Hurst's position is that his case should have been severed because of the restriction on his cross-examination. Again, we are dubious that any actual prejudice exists on the record of the first trial. Hurst wished to bring out his comments that Segal had a part in arranging the bribe. To believe that the jury was not fully aware of this fact, in view of the tape recordings, is to live in a never-never land. While the issue is an interesting one, we do not pass upon it because we have granted a new trial on other grounds.

The motion for severance, if made on retrial, must be decided on the record that is before the trial court at that time. We cannot anticipate what circumstances may exist then. For example, if Hurst should decide to testify on his own behalf, then the question would become moot because Segal could then have the right of cross-examination and the *raison d'être* of *Bruton* would not exist. *Nelson* v. *O'Neil,* 402 U.S. 622 (1971); *Government of Virgin Islands* v. *Ruiz,* 495 F.2d 1175 (3d Cir. 1974). Alternatively, in view of other evidence in the case, Hurst

may decide not to object to the deletions, or Segal may not insist upon redaction at the second trial.

We are not called upon to consider the propriety of alternatives which would obviate the *Bruton* problem; *e.g.*, empanelling two separate juries as was done in *United States* v. *Sidman*, 470 F.2d 1158 (9th Cir. 1972), *cert. denied*, 409 U.S. 1127 (1973), or holding a bifureated trial as was done in *United States* v. *Crane*, 499 F.2d 1385 (6th Cir.), *cert. denied*, 419 U.S. 1002 (1974). *See also United States* v. *Rowan*, 518 F.2d 686 (6th Cir.), *cert. denied*, 44 U.S.L.W. 3280 (U.S. Nov. 11, 1976). The propriety of those procedures can be considered if and when they are employed by the district court.[4]

The judgment of the district court will be reversed and a new trial ordered as to both defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

No. 76-221

In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK NATHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

ROBERT E. LINDSAY,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-221

JACK NATHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

There is no opinion of the district court. The opinion of the court of appeals (Pet. App. A) is reported at 536 F. 2d 988.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1976, and petitioner's petition for rehearing with suggestion for rehearing *en banc* was denied on August 6, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on August 13, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to instruct the jury that the proceeds of certain checks cashed by petitioner were paid out in kickbacks and therefore not includable in petitioner's income.

2. Whether the trial court improperly precluded petitioner from playing a tape recording, during cross-examination of a government witness, of a conversation between petitioner and the witness.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of willful evasion of income tax for the years 1967 through 1970, in violation of 26 U.S.C. 7201. The court sentenced petitioner to concurrent terms of nine months' imprisonment on each count and a fine of $10,000 on each count. The court of appeals affirmed (Pet. App. A).

The evidence at trial established that during the years in issue petitioner owned and operated a bill collection agency, Nathan, Nathan & Nathan, Ltd., which collected delinquent customer accounts owed to hotels (Tr. 28-29, 169, 377).[1] The collection receipts obtained by petitioner's agency were deposited in its bank account, and, after deducting a fee of approximately 35 percent, the agency remitted the balance to the client by a check carried on the agency's books as a "refund" (Pet. App. 2a). The gross receipts reported on the agency's tax returns for the years 1967 through 1970 were computed by subtracting the "refunds" to the hotels from the agency's gross collections (Tr. 197-199).

The proof established that petitioner employed two devices to understate the income of the agency. First, checks allegedly drawn to clients were carried on the agency's books as "refunds" and were subtracted from gross collections in computing gross receipts each year, even though

[1]"Tr." refers to the transcript of trial proceedings.

the checks had not been cashed three or more years after they were allegedly mailed to the clients (Tr. 447-448, 450-457; see also Tr. 32, 198-200, 220, 235). In 1967 and 1968, the total amount of these checks exceeded $26,000 (Tr. 475-476).[2] Second, petitioner drew checks to client hotels (St. Moritz, New York Hilton, Statler Hilton and Waldorf-Astoria) for which he received cash from the hotels. However, these checks were treated as "refunds" on the agency's books and deducted from gross collections (Tr. 105-106, 113-114, 151-153, 201, 244, 457, 548; Govt. Exs. 31-145, 336). For the period 1967 through 1970, petitioner cashed more than $36,000 in checks with his client hotels and treated them as "refunds" on the agency's books (Tr. 469-471, 475-476).[3]

In January 1966 petitioner hired Allan Edwards, a certified public accountant, to prepare his 1965 personal and corporate tax returns and to maintain the books of his

[2]The agency did not charge any of these outstanding checks back to income until 1971 (Tr. 220). In 1969, $11,515.74 of outstanding checks were treated as "refunds" on the company's books; in 1970, $5,958.54 of such checks were treated as "refunds" on the books (Tr. 456). Neither sum, however, was included in the computation of the understatement of income (Tr. 454). The 1969 and 1970 corporate returns were not filed until 1971 (see Tr. 228). These returns contained adjustments adding certain outstanding checks to income (*i.e.*, outstanding checks for 1963 and 1964 were deducted on the 1969 return and the 1965 outstanding checks were deducted on the 1970 return) (Tr. 234).

[3]In 1967 and 1968, the agency filed tax returns as a Subchapter S corporation. As the corporation's sole shareholder, petitioner was taxed on the corporation's net income. The understatement of the corporation's gross receipts and profits therefore resulted in an understatement of petitioner's taxable income. In 1969 and 1970, the agency filed tax returns as a regular corporation. Hence, the understatement of the corporation's income resulted in a corporate tax deficiency. However, petitioner's failure to report the cashed checks as dividend income resulted in an understatement of his personal income tax liability (see Tr. 472-475).

business (Tr. 21-29). The next month Edwards notified petitioner that he could not prepare the tax returns until certain entries in the corporate books, which reflected large amounts as "refunds" paid to hotels and which, in fact, reflected stale outstanding checks, were reversed (Tr. 32-34, 76-78). When petitioner failed to respond to Edwards' inquiry concerning these adjustments, Edwards refused to prepare and file the tax returns and obtained an extension of time for filing of the returns (Tr. 41-46). Petitioner then discharged Edwards and retained another accountant, Sanford Katz (Tr. 47, 171-172). Katz testified that in 1966 or 1967 he mentioned the outstanding checks to petitioner, and petitioner told him that he had instructed his bank to pay the checks if they were ever presented for payment (Tr. 213-214, 292, 389). By 1971, checks totalling approximately $50,000 were outstanding, dating back to 1963 (Tr. 447-456; Govt. Exs. 338, 441-444).

The checks that petitioner made out to the client hotels and cashed resembled genuine "refund" checks (Tr. 279-280; Pet. App. 4a). Both of petitioner's accountants had been led to believe that these checks were "refund" checks to clients, and petitioner never told them that he was obtaining cash for the checks at the client hotels, nor did he make any other elucidating entries on the stubs or face of the checks, which he generally drew himself (Tr. 222-224; Pet. App. 4a).

ARGUMENT

1. a. Petitioner contends (Pet. 6-7) that the trial court erred in refusing to instruct the jury that if it found that the proceeds from the checks cashed at the client hotels were paid out as kickbacks to assure a continued flow of business from the clients, then the jury could not consider the proceeds from such checks as petitioner's income.

But petitioner did not testify as to the payment of such kickbacks nor did he present any witnesses in his behalf. The only evidence of kickbacks came from the credit manager of the Waldorf-Astoria Hotel, Joseph Mazzurco, who testified that petitioner gave him $40 to $100 in cash approximately every two months (Tr. 153-156).[4] However, as the court of appeals noted (Pet. App. 5a), there was absolutely no evidence that these cash kickbacks came from the proceeds of the checks cashed at the client hotels. There was accordingly no basis upon which the jury could find that the proceeds of the checks were paid out as kickbacks.

Moreover, even assuming that the credit manager at each of the four hotels received the maximum cash kickback that Mazzurco testified he received ($600 per year), this would amount to only $2,400 per year and would account for less than seven percent of the cash proceeds received by petitioner from the checks.[5] There was no evidence whatsoever that petitioner paid out the remaining

---

[4]Petitioner also points (Pet. 7, n. 3) to the testimony of Leonard Groppe, credit manager of the St. Moritz Hotel. But Groppe did not testify to receiving any cash from petitioner, but merely stated that he received checks from petitioner on three or four occasions at Christmas (Tr. 112). Lawrence Carey, the credit manager of the New York Hilton Hotel, was not asked whether he had received cash kickbacks from petitioner.

[5]The number of checks and the amounts for which they were cashed in each year were as follows (Govt. Exs. 31-145, 336):

Year	*Checks*	*Total Amount*
1967	33	$9,485
1968	29	$9,480
1969	32	$10,485
1970	18	$6,670

proceeds from the checks as kickbacks to assure a continued flow of business. In short, the record was bare of any evidence in support of petitioner's proposed instruction. Under these circumstances, the trial court properly refused to charge the jury concerning these kickbacks. See *United States* v. *Achilli*, 234 F. 2d 797, 808 (C.A. 7), affirmed, 353 U.S. 373.

b. There is likewise no merit to petitioner's contention (Pet. 6-7) that the standard applied by the court of appeals in judging when the jury must be instructed as to a defense conflicts with the standard applied by other courts of appeals. In support of this argument, petitioner cites language in the court of appeals' opinion that the defense "was not sufficiently raised in the evidence" to require an instruction (Pet. App. 5a), and contrasts this statement with opinions of other courts of appeals that the jury should be instructed on a theory of defense "when the theory is supported by any evidence" (*United States* v. *Mathis*, 535 F. 2d 1303, 1305 (C.A.D.C.)) and that a theory of defense instruction may be denied only when the "record is wholly devoid of any such evidence" (*United States* v. *Achilli*, *supra*, 234 F. 2d at 808). While the court below stated the kickback defense "was not sufficiently raised in the evidence," the court further stated that "[n]o nexus between these payments and the proceeds of the challenged checks appears in the record" (Pet. App. 5a) and that "[t]here is not the slightest hint in the record as to a legitimate business usage for the remaining bulk of the cash proceeds of these checks" (*ibid.*). These latter two statements demonstrate that the court simply held that there was absolutely no evidence in the record which supported the kickback defense.[6] There is accord-

[6]Petitioner asserts that the court of appeals "ignored Mazzurco's testimony that what had been done for him represented a 'practice' or 'custom' in the trade" (Pet. 5). But Mazzurco did not testify

ingly no conflict with *Mathis* or *Achilli*; on these facts, courts applying the formulation of those cases would have reached the same result.

2. Petitioner also contends (Pet. 7-8) that the trial court erroneously precluded him from playing a tape recording, during his cross-examination of a government witness, of a conversation between petitioner and the witness. On cross-examination, Groppe, the credit manager of the St. Moritz, testified that in 1974 he told an agent of the Internal Revenue Service that certain checks from petitioner's agency payable to him, which the agent exhibited to him, were for collection work he had performed for petitioner (Tr. 122-126). Groppe denied that his statement to the agent was false (Tr. 126) and denied that he ever told petitioner that his statement was false (Tr. 127). Petitioner then sought to impeach Groppe with a tape recording of what purported to be a conversation between petitioner and Groppe in which Groppe acknowledged that he had never done any collection work for petitioner and that he had lied to the agent (Tr. 129).

At petitioner's suggestion, the court excused the jury (Tr. 131-132) and listened to the tape. After it became clear that petitioner had several conversations on the tape and could not locate the beginning of the conversation

that the payment of cash kickbacks was a practice or custom in the trade. Rather, he stated that it was a practice "in [his] business as the credit manager when [he] dealt with these people that they gave [him] gratuities from time to time" (Tr. 161-162). At all events, the court of appeals correctly held that the trial court properly refused the requested instruction, "[e]ven assuming that each of the credit managers at these hotels were receiving cash 'gratuities' of $200 to $500 per year" (the amount testified to by Mazzurco) from petitioner (Pet. App. 5a).

that he wanted to use on cross-examination,[7] the trial

---

[7]The following colloquy took place during the playing of the tape for the court (Tr. 129-130, 132-135):

THE COURT: What's the date of the tape?

MR. BENDER: I have to check it. I have to find out.

THE COURT: Find out.

(Pause)

MR. BENDER: 5/21/74.

THE COURT: And who initiated the call?

MR. BENDER: I think he said that he called.

THE COURT: But I don't know if that's the one that you have the tape on.

MR. BENDER: I think he said he did.

THE COURT: You must know who initiated the call.

MR. BENDER: I wish I did. I can find out.

(Pause)

MR. BENDER: Mr. Nathan says that the witness called him.

* * * * *

THE COURT: All right, Mr. Bender, put on the tape.

MR. BENDER: Could I have Mr. Nathan take over? He has got the machine.

THE COURT: Yes.

(Tape played.)

* * * * *

MR. WOHL: Can we hear the conversation from the beginning?

THE COURT: He is going to do that now.

THE DEFENDANT: Your Honor, I have two other tapes. I think they all – I had to tape these things because I knew they were making these people perjure themselves.

THE COURT: Mr. Nathan, you sort of started it in the middle. Is there a beginning to this tape?

THE DEFENDANT: I believe so.

THE COURT: Let's hear how that starts.

(Tape played.)

court ruled that the tape recording could not be used at that time, stating that "if during the defendant's case you

---

* * * * *

MR. BENDER: We want it in. We think it should go in and let the jury decide who is pressuring who.

THE COURT: What do you say?

MR. WOHL: I would like to hear the beginning of the conversation first. It is not a complete conversation and I am curious about that.

* * * * *

THE COURT: We are going to waste a lot of time on this, but it looks as though he didn't start in the beginning. Let's find that and put that on. See if you can find that.

MR. BENDER: Judge, that statement that you made bothers me.

THE COURT: What?

MR. BENDER: Do you feel that he pressured this witness into saying that he lied?

* * * * *

THE COURT: I am ruling if you insist on it, if we get the beginning of the conversation you can put it in and on the redirect he can bring out all kinds of things if he wants to, but okay.

* * * * *

THE COURT: Have we got the beginning of that conversation?

THE DEFENDANT: I believe so. I have trouble with my eye from that operation, so you will have to forgive me.

(Tape played.)

MR. WOHL: Excuse me, usually in these tape recordings there is a beginning.

THE COURT: That's what I am looking for. Where is the beginning?

THE DEFENDANT: Excuse me, your Honor. I believe at the end of this we will go open to the other. I believe so. I haven't played these things—

get this straightened out, you find out what conversations are what and who originated them and you want to put them on in the defense case, that will be all right, and if it is necessary to recall the witness we can do that" (Tr. 135).[8] As the court of appeals correctly recognized (Pet. App. 6a), it was "plainly within the trial court's discretion to avoid delays in the trial by requiring counsel who does not have his evidentiary material in workable order to proceed with examination of a witness rather than to bog down the trial by a lengthy, awkard in-court attempt to straighten matters out * * *." Indeed, here, the court only temporarily excluded the tape recording,[9] and petitioner never reoffered the tape. Thus, petitioner cannot complain of the exclusion of the tape, since he had an open opportunity to reoffer the tape once it was properly prepared for use. See *United States* v. *Badalamente*, 507 F. 2d 12, 22 (C.A. 2), certiorari denied, 421 U.S. 911.

THE COURT: You think this is a different conversation?

THE DEFENDANT: Yes, sir.

(Tape played.)

THE COURT: I am trying to get the beginning of the one that you had before. You don't know?

THE DEFENDANT: No, I don't know.

[8]It is clear that the court was not limiting petitioner to presentation of this tape during the defense case, but was perfectly willing to allow it to be presented as soon as it was properly prepared for presentation (see Tr. 134.)

[9]*United States* v. *Segal*, 534 F. 2d 578 (C.A. 3), relied upon by petitioner (Pet. 7-8), does not conflict with the decision below. There, the trial court totally precluded use of a tape on cross-examination on the ground that the tape had not been played on direct examination and that cross-examination could not exceed the scope of the direct examination.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

ROBERT E. LINDSAY,
Attorney.

OCTOBER 1976.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-221

JACK NATHAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION TO VACATE AND REMAND

NATHAN LEWIN
JAMES E. ROCAP, III
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Attorneys for Petitioner

Of Counsel:

THAL & YOUTT
919 Third Avenue
New York, New York 10012

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CASES

ARTICLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-221

JACK NATHAN, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION TO VACATE AND REMAND

In this tax-evasion case, a petition for a writ of certiorari was filed on August 13, 1976. The questions presented in the petition are, in our view, significant, but an even more serious constitutional issue relating to the fairness of petitioner's trial has emerged as a result of inquiries conducted after the filing of the petition.

On the eve of petitioner's trial, his retained counsel —who specializes in criminal tax matters—first advised petitioner that he had previously represented one Joseph Katzman, who was the accountant retained by

petitioner to straighten out his difficulties with the Internal Revenue Service after it became clear, during petitioner's routine audit, that petitioner's regular accountant had not performed his duties properly. Katzman had attempted to negotiate a settlement with the Internal Revenue Service, but withdrew from the case —without ever requesting a fee for his services—shortly thereafter when the Intelligence Division entered the investigation.

The matter of counsel's prior representation of Katzman was raised with the trial judge toward the conclusion of the first day of the trial. Petitioner's attorney stated that he had been "an attorney for Mr. Katzman" (indicating that this had "antedated" his representation of petitioner) and that he could not, on this account, properly cross-examine Mr. Katzman if he were called as a rebuttal witness. (A transcript of the full colloquy at trial appears as Appendix IV to this Motion.) He suggested that another attorney who had entered an appearance for petitioner at trial, but who was present less than 50 percent of the time and who was there as a "long-time friend and confidant" and not as trial counsel,[1] should cross-examine Katzman if he were called. Petitioner was asked, by the court, at trial counsel's urging, whether he agreed to "waive" his Sixth Amendment right to his regular trial counsel's representation if Katzman were called as a re-

[1] The affidavit of the attorney appears as Appendix III to this Motion. It also states that the attorney was then an Acting City Judge and had received "special permission" in order to appear at the trial. According to the attorney, petitioner's trial counsel first disclosed the possible conflict of interest "on the evening before the trial began" and stated, at that time, that he had "represented a client of Mr. Katzman, which client had certain difficulties with the I.R.S."

buttal witness. He stated that he had "complete confidence" in his trial lawyers and that he "will do anything they say." He was then asked, again at trial counsel's urging, whether he personally did "understand the situation," and he replied that he did and that he waived whatever right he had.

The central issue at trial was whether petitioner personally knew of two practices engaged in by his accountant which resulted in an improperly reduced income figure for his family owned collection business (and, thereby, for himself on his personal return). Petitioner had insisted on testifying before the grand jury during its investigation to assert his innocence, and the proof of guilty knowledge came principally from an accountant named Edwards who testified to a single conversation that occurred nine years earlier.[2] The accountant who actually did the work during the tax years in question, a man named Katz, testified that he received no instructions from the petitioner and that the accounting practices were entirely his own fault and attributable to personal problems.

No evidence was presented in defense at petitioner's trial. Although he had appeared voluntarily before the grand jury, he did not take the stand in his own defense. Nor was Katzman or his successor, an accountant named Mate, called to the stand as a defense witness.[3] Hearing only the prosecution's evidence, the

[2] The conversation was *not* reflected in any contemporaneous writing. In fact, the principal contemporaneous document—a typewritten note from the accountant to petitioner—contradicted the accountant's incriminating testimony.

[3] There was evidence from Katz that when the errors were brought to light during the IRS audit, he suggested that the matter would be promptly corrected with the filing of returns that would reflect

jury deliberated for an extended period (initially reporting a deadlock) and then found petitioner guilty on four of eight counts.

Petitioner first retained his present counsel after the jury verdict, and both trial counsel and petitioner's present counsel appeared for him at the time of sentencing. The direct appeal was prepared by petitioner's present counsel and, in view of the apparent "waiver" of the potential conflict-of-interest, no question was raised on appeal (or in the pending petition for certiorari) regarding trial counsel's representation of Katzman.

As a result of post-trial inquiry by petitioner and his present counsel, however, it was learned that Katzman had been the direct target of a criminal IRS investigation and that petitioner's trial counsel had effectively represented Katzman and avoided the filing of criminal charges against Katzman. This information was contrary to the understanding of petitioner and the "friend and confidant" who appeared as co-counsel at trial that Katzman was only peripherally involved in the matter which the trial attorney had previously handled. See paragraphs 10 and 6 of Appendices II and III, *infra,* respectively.

More importantly, post-trial inquiry disclosed that there was a far greater potential conflict than merely a matter of cross-examination of an individual who had been a client of trial counsel at some time in the

---

income in the current year. Katzman—who was Katz' senior by many years—advocated that only partial correction be made, and that added items be brought into returns for future years. Katzman's advice was taken, and petitioner was thereafter indicted *only for the items which had not been brought into income.*

past. It developed that Katzman's potential use as a rebuttal witness for the prosecution turned on the fact that, in a statement he had given the Internal Revenue Service in May 1973, he had accused petitioner of backdating corporate documents in order to be able to file a Form 1120 tax return rather than a form 1120S. Petitioner's trial counsel knew that if petitioner took the stand in his own behalf, he would be asked about the backdating of these documents, and Katzman would be called as a rebuttal witness to impeach petitioner. He also knew, however, that petitioner not only denied having done any backdating himself, but insisted to counsel that Katzman had had full charge of the family corporation's records and that if any backdating was done, Katzman was the one responsible. Consequently, the prospect at trial, if petitioner took the stand, was that two of trial counsel's clients would be accusing each other, under oath, of unlawful conduct. This possibility, and its effect on counsel's advice as to whether petitioner should take the witness stand or offer any defense, were not explained to petitioner on the eve of trial or on its first day—the first time when the possibility of a conflict was disclosed to petitioner.

The extent of the dilemma did not become apparent until trial counsel, in a letter dated August 23, 1976, to petitioner's present counsel, explained his failure to call Katzman as follows:

> Before talking to Katzman and before I knew that Katzman had been interviewed by the special agent and had given a statement, I accepted Nathan's version of Katzman's role and probably did say he should be a helpful witness. After reading Katzman's statement to IRS, I interviewed

him. The statement, as you know, contradicted Nathan's version of Katzman's role in the case. More than that, his testimony introduced an issue which could have been disastrous to Nathan insofar as the 1969 delinquent return was filed as an 1120 rather than as an 1120S. In the statement, as I recall it, to the IRS Katzman said that Nathan had told him there was a change in ownership which affected the 1120S and therefore, Katzman said, under these circumstances the 1969 return could be filed as an 1120. Katzman said Nathan had the documentary proof to show the change of ownership, such as the corporate minutes and issuance of corporate stock, although Katzman said he didn't see them. Katzman went further and said that Nathan suggested this change because it would be cheaper to tax the additional income on adjustments of the outstanding checks at corporate rates of 48% rather than the individual rates which would occur under an 1120S. Nathan was shocked about Katzman's statement. Nathan contended it was Katzman who suggested the change from the 1120S to the 1120 and that it was Katzman who suggested that he backdate the corporate minutes to reflect a change of ownership and to issue corporate stock by backdating its date of issuance. Nathan stated that the corporate minutes and stock certificates were prepared by his then lawyer who was deceased in 1975. Katzman's statement to the IRS and his contradictions of Nathan's position made it difficult to use him as a witness in our case. Katzman had been subpoenaed to be a Government witness but the Government changed its mind and didn't call him. Nathan claimed he had never read Katzman's statement to the IRS. I had obtained a copy of it from prior counsel.

Trial counsel's interest in shielding Katzman from possibly dangerous consequences of courtroom testimony could have been a significant factor—whether conscious or not—in his judgment on various important strategic decisions relating to petitioner's defense, including whether petitioner should take the stand, whether other accountants should be called as defense witnesses, and whether Katzman himself should be called as a defense witness. The interrelation between these questions of basic trial strategy—on which the petitioner personally expressed his own view to his attorney[4]—and the potential swearing match between Katzman and petitioner was never discussed with petitioner, and his "waiver" at trial assuredly did not relate to these fundamental questions on which he needed the undivided loyalty of the attorney representing him at trial. A more detailed explanation of the conflict and how it affected the trial—including even the cross-examination of Katz—is set out in the affidavit of Steven H. Thal, Esq., which appears as Appendix I to this motion.[5]

The above facts, we submit, more than amply warrant a complete evidentiary hearing to determine whether petitioner was deprived, by reason of this conflict, of the assistance of counsel guaranteed by the

---

[4] See petitioner's affidavit and that of co-counsel, which appear as Appendices II and III, and particularly paragraph 6 of petitioner's affidavit ("[t]hroughout the course of his representation of me—up to and including the trial—I insisted on taking the witness stand and on calling both Messrs. Katzman and Mate as witnesses") and paragraph 5 of co-counsel's affidavit ("Mr. Nathan always wanted to take the stand in his own defense and to have Mr. Joseph Katzman and Mr. Ted Mate called as witnesses").

[5] Mr. Thal was retained after petitioner's appellate counsel received the letter of August 23, when it appeared that the "conflict" question was more serious than emerged from the trial colloquy. He conducted an investigation and filed the instant motion in the district court on October 7, 1976.

Sixth Amendment. In *United States* v. *Hayman,* 342 U.S. 205 (1952), a similar claim by a convicted defendant was held by this Court to require a full hearing on notice, even though the district court had evidence that the defendant knew and consented to the conflict and may, in fact, have requested the dual representation. See 187 F.2d 456, 460 (9th Cir. 1950).

We believe that a full evidentiary hearing on this question will demonstrate that on these facts—as fully as those in *Glasser* v. *United States,* 315 U.S. 60 (1942) —petitioner's trial counsel was caught, consciously or not, in a "struggle to serve two masters." 315 U.S. at 75. In *Glasser,* this Court concluded that the court appointment of one attorney to represent two co-defendants had led it "to the conclusion that [trial counsel's] representation of Glasser was not as effective as it might have been if the appointment had not been made." 315 U.S. at 76. On this basis, the Court concluded that Glasser had been denied his Sixth Amendment right.

The principle of the *Glasser* case has been applied in a variety of circumstances, and courts of appeal have said that it is immaterial whether the attorney whose loyalties are divided is court-appointed or privately retained. See *United States ex rel. Hart* v. *Davenport,* 478 F.2d 203 (3d Cr. 1973); *United States* v. *Foster,* 469 F.2d 1 (1st Cir. 1972); *United States* v. *Lovano,* 420 F.2d 769 (2d Cir.), *cert. denied* 397 U.S. 1071 (1970); *Porter* v. *United States,* 298 F.2d 461 (5th Cir. 1962); *Craig* v. *United States,* 217 F.2d 355 (6th Cir. 1954); *United States ex rel. Williamson* v. *LaVallee,* 282 F. Supp. 968 (E.D. N.Y. 1968). See Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases,* 59 Nw. U.L.Rev. 289, 355 (1964).

The *Glasser* rationale has been held to apply not merely to the common problem of joint representation of co-defendants, but also to the conflict of interest that may arise when an attorney owes a duty to a witness in a criminal proceeding, or to some other third party. *Tucker* v. *United States,* 235 F.2d 238 (9th Cir. 1956); *Taylor* v. *United States,* 226 F.2d 337 (D.C. Cir. 1955); *United States ex rel. Williamson* v. *LaVallee, supra; Scott* v. *District of Columbia,* 99 A.2d 641 (Munic. Ct. App. D.C. 1953), *aff'd,* 214 F.2d 860 (D.C. Cir. 1954). See generally, Judd, *Conflicts of Interest —A Trial Judge's Notes,* 44 Ford. L. Rev. 1097, 1104-05 (1976). Moreover,

> [u]nder the *Glasser* rationale it is of no legal significance that the conflict . . . first arose during trial and was not foreseen by the parties or the trial court; if solitary counsel is hamstrung by a conflict of interests coming to light in mid-trial a requested mistrial or new trial should be granted. Waltz, *Inadequacy of Trial Defense, supra,* 59 Nw. U.L.Rev. at 334-335.

In short, *Glasser* and its progeny have settled beyond peradventure the proposition that, where the defense is hampered by counsel's conflict of interest—to the point, *Glasser* holds, where it "was not as effective as it might have been"—there is a denial of the Sixth Amendment right to the assistance of counsel.

Two district court cases in the Second Circuit are closest to the facts at issue here. In both, district courts recognized that an attorney's conflict of this kind violates the constitutional guarantee and requires a new

trial. See *United States ex rel. Williamson* v. *LaVallee*, 282 F. Supp. 968 (E.D. N.Y. 1968), and *Cavallaro* v. *United States*, 359 F. Supp. 1276 (D. Conn. 1973). The conclusion of District Judge Newman in the *Cavallaro* case appears to apply, in virtually all respects, to the present case (359 F. Supp. at 1278):

> Pulver did not receive the effective assistance of counsel with respect to the decisions not to present any defense testimony and not to testify. It is not the absence of defense testimony nor the fact that Pulver failed to testify that warrants this conclusion. The Sixth Amendment was violated in Pulver's case because, in view of all the circumstances known to the defense attorney, he could not impartially and effectively advise Pulver on whether to present defense testimony and whether to testify. Leudecker knew that Pulver was not employed by Wisniewski. He knew that Pulver was vigorously contending lack of guilty knowledge and had some evidence to corroborate his claim. He knew that Pulver wanted to testify yet he advised against it. It may be that a completely objective and impartial defense attorney in such circumstances would have shared Leudecker's view that neither Pulver nor anyone else should testify in his behalf. But Leudecker was not in a position to give Pulver effective advice on these critical subjects.

The facts regarding this conflict were brought to the attention of the district court with a fully documented application under 28 U.S.C. § 2255 filed on October 7, 1976. The district judge, who was requested simultaneously to continue petitioner on bail pending the outcome of the proceeding under Section 2255, refused to conduct a hearing or to continue petitioner on bail.

His conclusion was based, in part, on his agreement with the prosecution's argument that he had no jurisdiction to consider a Section 2255 application while a petition for certiorari is pending in this Court.[6]

The question of petitioner's release on bail pending decson on the Secton 2255 application was then taken to the court of appeals. The argument before that court —which is reproduced, in pertinent part, as Appendix VI to this motion—centered on the jurisdictional issue as to whether a Section 2255 application is premature if filed while a petition for certiorari is pending on direct review of a criminal conviction. The court of appeals suggested, in the course of argument, that the proper procedure would be to request this Court to remand the case to the district court for a hearing on the constitutional claim. In order to afford petitioner an opportunity to do so without suffering irreparable harm, it deferred petitioner's surrender date.[7]

---

[6] The trial judge's full ruling appears as Appendix V to this motion. It rests, *inter alia*, on several factual misapprehensions such as the judge's recollection that co-counsel had conducted some cross-examination (he did not), and that any problem had been "happily resolved during the trial." The problem was resolved, of course, by the absence of any defense case.

[7] Petitioner's counsel called the court's attention to the "impossible dilemma" presented by the combined effect of the Second Circuit's denial of bail pending action on the certiorari petition and the assertion that a Section 2255 application was premature if filed before this Court acted on the petition. That would mean that notwithstanding the obvious substantiality of the petitioner's Section 2255 claim and the unfairness of imprisoning petitioner until that question is resolved, he would have to go to jail because the court below did not believe that the issues presented on direct appeal warrant bail pending certiorari. Judge Gurfein, recognizing this anomaly, replied:

> It's a catch 2255.

There is authority for the proposition that an application under Section 2255 cannot be acted upon while a direct appeal is pending. *E.g., Welsh* v. *United States,* 404 F.2d 333 (5th Cir. 1968); *Greer* v. *Estelle,* 378 F. Supp. 162 (S.D. Tex. 1974); *Jones* v. *United States,* 453 F.2d 351 (5th Cir. 1972). Although two decisions in the District of Columbia Circuit authorize such action in "extraordinary circumstances" (*United States* v. *McCord,* 509 F.2d 334, 340 n.6 (D.C. Cir. 1974); *Womack* v. *United States,* 395 F.2d 630 (D.C. Cir. 1968)), the precise nature of this exception is unclear.

The result of such a jurisdictional flaw is that petitioner suffers a conviction (and imprisonment if, as could be true here, no additional stay is granted) even though he has filed an expeditious and substantial application for relief on constitutional grounds. As the court of appeals observed, however, this Court has full authority—which it frequently exercises—to obviate injustices of this kind by remanding a case for development of a proper evidentiary record in the trial court.

In *DeMarco* v. *United States,* 415 U.S. 449 (1974), for example, the Court was confronted with an analogous situation. A question as to whether a prosecutor had made a leniency promise to an important prosecution witness emerged between the conclusion of petitioner's trial and appeal. The alleged invalidity of the trial under *Giglio* v. *United States,* 405 U.S. 150 (1972), was argued to the court of appeals without the development of an adequate factual record. This Court held that the factual issue should have been resolved on a remand of the case to the district court. Accordingly, it granted the petition for certiorari, vacated the judg-

ment of the court of appeals, and remanded the case for further proceedings in the district court.

The same procedure is appropriate here and was, at least by implication, invited by the court below. If these full facts had been developed prior to consideration of petitioner's appeal, it would, of course, have been proper for the court of appeals to remand the case, before considering the appeal, for an evidentiary hearing on the Sixth Amendment issue. The pendency of the case on this Court's docket does not preclude similar relief here.[8]

---

[8] It would not, of course, be sensible or efficient for the Court to grant certiorari on either or both of the questions presented so long as the uncertainty as to the Sixth Amendment issue is left unresolved. Since a resolution of the Section 2255 application in petitioner's favor would require a new trial, the issues presented in the petition could become moot. If, on the other hand, the Court is inclined to consider the petition—to which no response has yet been filed—and to deny certiorari, it could do so (as it did in the *Rosner* case to which the court of appeals referred) by making the denial without prejudice to the consideration of the question presented in the Section 2255 application. *Rosner* v. *United States,* 417 U.S. 950 (1974). In that event, however, special judicial orders continuing petitioner's release on bail pending disposition of that application would be required to obviate the injustice which now looms ahead. *See Boyer* v. *City of Orlando,* 402 F.2d 966, 968 (5th Cir. 1968); *Goodman* v. *Ault,* 358 F. Supp. 743, 747 (N.D. Ga. 1973).

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded for the development of a full factual record on the claim made in petitioner's application under Section 2255.

Respectfully submitted,

NATHAN LEWIN
JAMES E. ROCAP, III
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Attorneys for Petitioner

Of Counsel:

THAL & YOUTT
919 Third Avenue
New York, New York 10012

APPENDIX

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

76 Civ.
D.B.B., U.S.D.J.
(Original Case No. 74 CR 377)

JACK NATHAN, *Plaintiff-Petitioner,*

—against—

UNITED STATES OF AMERICA, *Defendant.*

Affidavit in Support of Motion to Vacate Judgment and to Extend Bail Pursuant to 28 U.S.C. § 2255 and for Other Incidental Relief

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

STEVEN THAL, an attorney admitted to practice in the State of New York and in the United States District Court for the Southern District of New York, being sworn, deposes and says:

1. I am a partner in the law firm of Thal & Youtt, attorneys for defendant Jack Nathan herein.

2. Defendant was found guilty, after a trial by jury in this Court, on four of ten counts of federal income tax evasion in violation of 26 U.S.C. § 7201. Defendant was sentenced to nine months incarceration on each count (running concurrently) and fined $40,000. Judgment was entered on December 8, 1975.

3. Mr. Nathan's conviction was affirmed on June 16, 1976, and a petition for rehearing was denied on August 6, 1976. Thereafter, on August 13, 1976, a petition for a writ of certiorari from the Supreme Court was timely filed, and said petition is presently still pending.

4. Mr. Nathan is scheduled to surrender for incarceration on October 12, 1976.

5. I have only recently been retained to act as co-counsel for Mr. Nathan in conjunction with his continued representation by Nathan Lewin, Esq. of the law firm of Miller, Cassidy, Larroca & Lewin in Washington, D.C. Mr. Lewin has represented Mr. Nathan as appellate counsel, since the time of conviction.

6. During the course of the appeals in this matter Mr. Nathan's continued and vehement protestations of innocence caused Mr. Lewin substantial concern. Therefore, Mr. Lewin suggested that Mr. Nathan take a polygraph examination on the central issues of the trial. Mr. Nathan readily agreed and such an examination was made by a reputable expert in the field. That examination resulted in a report which opined that Mr. Nathan did *NOT* wilfully evade income taxes either by carrying uncollected checks on his company's books or by misallocating checks which he cashed at various hotels (both of which theories were the essence of the Government's case). In addition, the polygraph indicated that Mr. Nathan had *NO* knowledge of wrongdoing by his accountant—Sanford Katz—who admitted at trial that he had been solely responsible for preparing Mr. Nathan's books and tax returns [1] [Polygraph result annexed hereto as Exhibit 1.] Mr. Nathan also advised Mr. Lewin that he was prepared to take additional polygraph tests administered by the Government if that would help establish his innocence.

7. With this information in hand, Mr. Lewin met with various members of the United States Attorney's Office while the appeal was pending, to discuss Mr. Nathan's adamant protestations of innocence, the polygraph results

[1] Mr. Katz testified at length during the trial as a Government witness and admitted that he alone had been responsible for the errors in the company books and in the tax returns.

and to determine whether and where in the course of the trial there could have been a miscarriage of justice. At that time there was yet nothing really definitive known to counsel which could be shown to be the cause of an incorrect verdict. The Government remained unpersuaded of any injustice at the end of the aforesaid meetings.

8. Despite his unsuccessful approaches to the United States Attorney's Office, Mr. Lewin continued his various efforts to find out what, if anything, could have yielded an incorrect verdict. Included amongst these efforts was his decision to have Mr. Nathan retain independent counsel to make a thorough review of the record and to undertake collateral investigations in connection therewith. That was the purpose for which my firm was retained.

9. The most unusual aspect of the trial record was the absence of any witnesses, including the defendant, on behalf of the defense. Based upon certain inquiries made by Mr. Lewin and myself, it seemed clear that there was a very substantial defense case which had simply never been presented to the jury. In depth interviews with Mr. Nathan and other participants at the trial made it clear that witnesses who were ready and able to testify (and who could have contributed a great deal to the defense) were never called. Our view of the importance of presenting a defense case was buttressed by our evaluation that the prosecution's evidence had been weak and that there had been large gaps in the Government's case which were never exploited.

10. Certainly, the failure to summon witnesses, as a simple function of trial strategy can rarely, if ever, be questioned at this stage of the proceedings. We do not purport to do so here. However, what our investigation has demonstrated is the very startling revelation that the failure to present a defense has been elevated from the level of a strategy disagreement to one involving a possible miscarriage of justice of constitutional dimensions.

11. Defense counsel at trial had a conflict of interest between two clients which completely immobilized him (perhaps without his knowledge) when it came to presenting a defense case. The attorney—Louis Bender, Esq. —represented Mr. Nathan in the instant case and one of Mr. Nathan's accountants (Joseph Katzman) in another criminal investigation by the I.R.S. The complexity of the inter-relationship between these two clients and their two separate cases may have escaped Mr. Bender but it nevertheless must have had a very substantial impact on the decisions he made during the course of Mr. Nathan's trial as well as in pre-trial preparation.[2]

12. What may have misled Mr. Bender and the Court (as it certainly misled Mr. Nathan and subsequent counsel who reviewed the record) was that while the problem hardly surfaced at the trial, its influence was all pervasive. Specifically, the conflict of interest affected FIVE strategic areas:

1. the possibility of Mr. Katzman's testifying as a Government witness, subject to cross-examination by Mr. Bender;
2. the possibility of Mr. Katzman testifying as a defense witness;
3. the possibility of defendant taking the stand and incriminating Mr. Katzman during his testimony;
4. the possibility of Mr. Bender effectively cross-examining Mr. Katz who may have testified unfavorably against Mr. Katzman's activities;

[2] I wish to emphasize here that Mr. Bender may not have realized the full scope of the conflict and that no allegation whatsoever is being made that he acted intentionally to deprive Mr. Nathan of his rights. I have attempted, where possible, to set this forth in the body of my affidavit but additionally wish to make it clear at the onset.

5. the possibility of additional defense witnesses taking the stand who may also have testified unfavorably against Mr. Katzman's activities.

As will be seen, the first of these five possibilities was dealt with on the record at the trial. But the other four were not. Ironically, as will also be seen, it may be that the apparent resolution of the first conflict area lulled all concerned into a false sense of security which prevented a critical confrontation with the other conflict areas.

13. At the close of the first day of the trial, a discussion between the Court and all counsel was held regarding Mr. Bender's inability to cross-examine a potential Government rebuttal witness—Joseph Katzman. The substance of that conference was that Mr. Bender had represented Mr. Katzman on another matter prior to and during the period he represented Mr. Nathan and that he felt he could not properly cross-examine Mr. Katzman, if that became necessary. Mr. Bender felt "If Mr. Katzman testifies as a witness, obviously I can't disclose any confidential communication given to me by Mr. Katzman." Trial transcript p. 176. The situation was explained to Mr. Nathan and everyone agreed that the problem would be resolved if Mr. Baltimore undertook cross-examination. Since Mr. Katzman was never called as a rebuttal witness the problem appeared to have resolved itself and was soon forgotten. (Copies of transcript pages 173-177 are annexed hereto as Exhibit 2).

14. The problem did not come back into focus again until recently when we learned certain new facts which, when pieced together with what we already knew, made us aware of the full scope of the conflict. Even Mr. Bender was probably never aware of the full problem until we discussed it with him recently.

15. The facts surrounding the conflict, as we now understand them, seem to be as follows. In about November, 1971, during the course of the regular I.R.S. audit of Mr. Nathan, he decided to retain a new C.P.A. to assist Sanford Katz. The new accountant happened to be Joseph Katzman. Mr. Katzman became the key man in representing Mr. Nathan with the I.R.S. He discovered the failure of Sanford Katz to keep Mr. Nathan's books and tax returns up-to-date. He was also responsible for having everything brought current and for negotiating a settlement with the I.R.S. on Mr. Nathan's behalf. (See Affidavit, Exhibit 3). Sometime during this period, Mr. Katzman became involved in a separate I.R.S. criminal investigation involving himself and one or more other persons—all unrelated to Mr. Nathan's case. Mr. Katzman did not disclose his personal problems to Mr. Nathan. Mr. Katzman did, however, retain counsel to represent him in his own matter. That counsel was Louis Bender. When the intelligence division entered Mr. Nathan's case, Mr. Katzman indicated his desire to withdraw as Mr. Nathan's accountant. In hindsight it is now very clear as to why Mr. Katzman desired to step out of the picture. Mr. Nathan was always puzzled by this action but never understood the reason why. He has, for example, told me that he was never advised by Mr. Katzman that Special Agents had begun an investigation and that he accidentally found out from his bank that they received a subpoena. Mr. Nathan also told me that he later called Mr. Katzman to ask him why Mr. Katzman did not notify him of the transfer of his case from regular auditors to Special Agents. Mr. Katzman apparently gave no real answer and just expressed his desire to withdraw. Mr. Nathan then retained Mr. Ted Mate as his accountant to deal with the I.R.S.

16. On May 11, 1973, Mr. Katzman gave a sworn statement to I.R.S. Special Agents regarding his association with Mr. Nathan. We do not know presently whether he

was already represented by Mr. Bender at this time. (copy annexed as Exhibit 4)

17. Sometime in mid-1974, Mr. Nathan retained Mr. Bender as his counsel. At the very outset Mr. Nathan advised Mr. Bender that he believed Mr. Katzman would be a key witness on his behalf since he had first-hand knowledge of the wrong-doings of Sanford Katz. Mr. Bender did not mention anything regarding his representation of Mr. Katzman, which was still continuing. (See Nathan Affidavit, Exhibit 3.) While Mr. Bender has advised both Mr. Nathan and Mr. Lewin that he represented both men at the same time, he has stated that he did not realize it was the same Joseph Katzman until he contacted Mr. Katzman to interview him regarding Mr. Nathan. Apparently when they met, face to face, Mr. Bender did make the connection. Neither Mr. Bender nor Mr. Katzman advised Mr. Nathan of the dual representation when it first became apparent to them.

18. Throughout the period that Mr. Bender was representing both Messrs. Nathan and Katzman he was hearing Mr. Nathan's version of the facts and also Katzman's somewhat different version—as supplied to the I.R.S. previously. Mr. Bender has advised Mr. Lewin that while he originally accepted Mr. Nathan's version of Katzman's role, and did say he thought Katzman would be a good witness, he changed his mind after reading Katzman's I.R.S. statement and after interviewing him. Although perhaps unintentionally, it is clear that Mr. Bender *did not disclose* to Mr. Nathan that he no longer believed Mr. Nathan's version of the facts, that he now believed Mr. Katzman's version, that he may have been concerned about Katzman's statement to the I.R.S. *AND* that he did not believe Katzman would be a helpful witness any longer.

19. During the course of this dual representation, Mr. Bender also learned from Mr. Katzman (which was also

contained in the sworn I.R.S. statement) that Mr. Katzman had incriminated Mr. Nathan as to a scheme to backdate some corporate documents and thereby commit another and different tax fraud, involving a Subchapter S corporation. Mr. Bender again (probably without realizing it) believed what he heard from Mr. Katzman and again he did not disclose this information to Mr. Nathan. All of this occurred despite the fact that Mr. Nathan at the same time persisted in telling Mr. Bender that he wanted Mr. Katzman as a witness. He also told Mr. Bender that Mr. Katzman had suggested to Mr. Nathan that he backdate the corporate documents. (See Nathan Affidavit, Exhibit 3.)

20. Finally, as the day of trial approached (as best we can presently determine, it was the day before the trial) Mr. Bender told Mr. Nathan and Mr. Baltimore (who was only partially involved in the trial) in general terms that he represented Mr. Katzman but claimed he could not go into details because of the attorney-client privilege. *Both* Mr. Nathan and Mr. Baltimore understood from this conversation that Mr. Bender represented a client of Mr. Katzman and that Mr. Katzman was only collaterally involved. (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.) It is, however, clear that Mr. Bender did not disclose that Mr. Katzman was involved in a criminal case, nor that Mr. Katzman had turned Mr. Bender away from his primary duty to Mr. Nathan by diverting his trust and faith in Mr. Nathan's statements and positions. Mr. Bender also did not disclose that, intentionally or not, he had already made up his mind not to call either Mr. Nathan or Mr. Katzman to the stand since they each would make incriminating statements about the other.

21. The foregoing interplay between the two clients and their two cases—as acted out on their one attorney—set the stage for Mr. Nathan's trial and the defense which could not be put on.

22. The die was already cast on the first day of the trial. Mr. Bender has advised Mr. Lewin that he still contemplated putting Mr. Nathan on the stand at that time. Mr. Bender must have learned that the Government had brought Mr. Katzman to court and expected to call him as a rebuttal witness if Mr. Nathan took the stand, and therefore he changed his mind. The in-chambers conference on the first day of trial referred to in ¶ 13 *supra*, (Exhibit 2) clearly reflects the rebuttal nature of Mr. Katzman's testimony. Neither Mr. Nathan nor Mr. Baltimore understood the real nature of the problem raised at this conference. (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.)

23. At the trial, Mr. Nathan kept asserting that he wanted to take the witness stand on his own behalf. Mr. Bender kept him from doing so. (See Nathan Affidavit, Exhibit 3 and exhibits thereto and Baltimore Affidavit, Exhibit 5.) The significance and veracity of Mr. Nathan's contention is reinforced by the fact that Mr. Nathan voluntarily appeared before Assistant United States Attorney Putzel (without counsel) *and* before the Grand Jury investigating his case, and on both occasions fully and completely set forth his position. Even the Court expected Mr. Nathan to take the stand in a case such as this. "The defendant is going to testify in his defense, I take it?" (Transcript, p. 429, Exhibit 6.)

24. Why then did he not testify at the trial? Mr. Bender advised Mr. Lewin that he was afraid to put Mr. Nathan on the stand because of the affidavit supplied to the Government by Mr. Katzman. In this affidavit, Mr. Katzman stated that Mr. Nathan requested a change in the 1969 corporate tax return from an 1120S return to an 1120 (which would result in a substantial tax savings).[3] Mr.

[3] Mr. Nathan's corporation had always been a Subchapter S Corporation, with him as sole stockholder. While Mr. Katzman was supervising the preparation of the *delinquent* 1969 tax return, it

Katzman stated that although he never saw the documents to support this change in status, Nathan assured him they existed. Presumably Mr. Bender was concerned that the documents did not exist and that Mr. Nathan would be vulnerable on cross-examination, or if Mr. Katzman were called by the Government as a rebuttal witness.

25. According to Mr. Nathan (See Nathan Affidavit) he always assured Mr. Bender that it was Katzman who had suggested the change from an 1120S to an 1120 filing and that Mr. Katzman had told Nathan to see his lawyer (now deceased) about preparing some papers and backdating them. Mr. Bender has confirmed to Mr. Lewin that this was the explanation given to him by Nathan.

26. What one has here is an attorney with two clients telling diametrically opposite stories and each incriminating the other in a criminal fraud. Perhaps without realizing what was happening, Mr. Bender resolved this conflict by keeping both clients from taking the stand.

27. In addition, Mr. Bender was already influenced before the trial by the story told by Mr. Katzman. Normally an attorney must begin with a presumption and belief that his client is telling the truth. The duty of an attorney is then to seek verification and support for his client's version of the facts. In this case, Mr. Bender heard Mr. Nathan's story and then saw Mr. Katzman's

---

appeared that the filing of a regular return (form 1120) rather than the Subchapter S return (form 1120S) would save Mr. Nathan a substantial amount of money. Someone apparently devised the idea that if stock had been sold or given to a new shareholder during the year 1969 [and no consent to continuation of Subchapter S treatment having been filed within 30 days] then the corporation would have automatically lost its Subchapter S status and the use of a regular 1120 return would be correct. The question then was who had devised this idea and who had suggested the backdating of corporate documents to reflect a gift or sale of shares.

I.R.S. affidavit and owed the same duty to both.[4] How could he seek to verify and support these two conflicting stories before trial in order to decide whether to put Mr. Nathan on the stand and discredit Mr. Katzman?

28. Mr. Nathan's waiver of his right to take the stand was never put into the trial transcript nor did he sign any waiver of this right. This certainly leads one to question how voluntarily this waiver was or whether it was done under pressure of his counsel.

29. Mr. Bender was in a bind even if he just put Mr. Nathan on the stand and allowed the Government to cross-examine him on the Subchapter S problem. If Mr. Nathan incriminated Mr. Katzman, then Mr. Bender would have violated his duty of undivided loyalty to Mr. Katzman by allowing incriminating evidence against him to come out.

30. Turning now to the other side of the coin, one finds a similar problem in reverse. Throughout the pretrial stage of the case, Mr. Nathan insisted to Mr. Bender that Joseph Katzman was going to be a key witness for him. Even during the trial Nathan kept telling Bender he wanted Katzman called. (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.) This is independently verified by the relevant entries in Nathan's trial notebook (See Exhibit to Nathan Affidavit). Obviously Mr. Katzman was never called as a defense witness. We need not speculate too much as to why Mr. Katzman was not called. First, the Government would presumably have cross-examined him on his involvement in the "unrelated" criminal tax fraud investigation. This would be a very uncomfortable position for Mr. Bender. His client

---

[4] Mr. Bender refers to the problem of divided loyalties in the conference with the Court set forth in Exhibit 2 but at no time did he explain to Mr. Nathan that he had divided loyalties as to the whole defense case.

would be giving sworn testimony to the Government on a pending investigation. Second, his testimony would create a public record of something which Mr. Bender had been trying to settle informally (and eventually he did settle Mr. Katzman's problems without judicial proceedings and without any negative consequences to him). Mr. Katzman advised Mr. Nathan in a recent telephone call of the satisfactory outcome of this problem. (See Nathan Affidavit, Exhibit 3.) Third, if Katzman had begun to testify to the subchapter S problem on cross-examination by the Government, Mr. Bender would have had little choice but to call Mr. Nathan at least to rebut this. Then the door would have been opened as to the two incriminating contradictory statements on the record by both clients.

31. The reason that Mr. Nathan kept insisting before and during the trial that Mr. Katzman should be called as a witness is very simple. When Nathan became aware that Sandy Katz was not properly handling the I.R.S. audit he felt he needed to call in a more experienced accountant—Joseph Katzman. When Mr. Katzman came in to assist Sanford Katz, he discovered that Sanford Katz had fallen years behind in keeping the books and in filing tax returns. Sanford Katz admitted his failings to Mr. Katzman and Mr. Katzman prepared the first affidavit for Sanford Katz to sign in which Sanford Katz took the blame and exculpated Mr. Nathan (See Katz Affidavit annexed as Exhibit 7). It was also Mr. Katzman who dissuaded Mr. Nathan from filing criminal charges against Sanford Katz after it was learned that Sanford Katz had not done any work for years while taking his regular fees. It was also Mr. Katzman who advised various other Governmental authorities of Mr. Nathan's innocence in failing to file timely tax returns and who put the blame on Sanford Katz for these failures. (See Katzman letters annexed hereto as Exhibits 8, 9, 10 and 11.) Finally, and probably most significantly, it was Mr. Katzman who

proposed and arranged the method by which Sanford Katz's failure to properly prepare prior returns was to be remedied. Mr. Katzman decided that 1964 stale checks would be returned to income in the 1969 return, 1965 stale checks would be picked up as income in 1970, etc. This was done for each year up to 1967. No adjustments were made for 1967 and later years, since five years had not expired. *No criminal charges were based upon any of the years written off in this manner, but unnegotiated checks issued in 1967 and later became part of the charge of tax evasion.* Sanford Katz testified at the trial that this was Mr. Katzman's proposal and that he, Sanford Katz, wanted to write off all checks after 12 months on the tax return for that year or the next (transcript p. 382-383 annexed as Exhibit 12). All of these areas would have been extremely helpful to Mr. Nathan if they had been brought out in the defense case by having Mr. Katzman on the stand.

32. I have interviewed another potential defense witness who advised me that he was available and willing to take the witness stand. This was Mr. Ted Mate. He was also a C.P.A. who had been hired by Mr. Nathan when the regular audit was referred to the intelligence division of the I.R.S., and after Mr. Katzman retired from the engagement. Mr. Mate was prepared to testify regarding the system devised by Mr. Katzman to write off stale checks. He also asked Mr. Nathan before the indictment why there had been a change from the 1120S to the 1120 filing for 1969 and Mr. Nathan told him that this change was Mr. Katzman's idea. Thus, Mr. Mate would have been another witness who would have been able to testify in Mr. Nathan's favor while also discrediting Mr. Katzman—and certainly Mr. Katzman's version of the Subchapter S incident.

33. In addition to his testimony regarding Mr. Katzman, Mr. Mate had drawn certain conclusions from his

review of Mr. Nathan's books which are consistent with Mr. Nathan's version of the facts. For one thing, Mr. Mate concluded that the volume of stale checks increased substantially after Sanford Katz took over the accounting work. Up until then, there were apparently only very few outstanding stale checks. He also would have testified to numerous other errors in bookkeeping and bank reconciliations would had been made by Sanford Katz but which were unrelated to the charges in the indictment (some of which worked against Mr. Nathan and cost him money). This would, at least in part, confirm the defense theory of the case that the blame for the incorrect tax returns was solely on Sanford Katz. At all times, Mr. Nathan wanted Mr. Mate called as a witness. (See Nathan Affidavit, Exhibit 3 and Baltimore Affidavit, Exhibit 5.)

34. Again, however, Mr. Bender was probably influenced not to call Mr. Mate, after interviewing him, since he might testify to the detriment of Mr. Katzman in a number of ways. *More importantly, once the decision was made not to call Mr. Nathan or Mr. Katzman, it was better to put on no defense than to call Mr. Mate, as a lone witness.*

35. Finally, the conflict of interest also affected Mr. Bender's ability to cross-examine the Government witness —Sanford Katz. Katz testified that it was Mr. Katzman's method to write off the stale checks after five years and that Mr. Katzman had spoken to Revenue Agent Kerr about his plan. Sanford Katz also testified that he himself had wanted to write off the stale checks within approximately 12 months but that Mr. Katzman had disregarded his advice. (See App. 308-312 annexed hereto as Exhibit 12.) Mr. Bender, on cross-examination of Sanford Katz, never brought this point home. He never opened the door for Sanford Katz to emphasize that it was all Mr. Katzman's idea to use the five (5) year write-off system which ultimately resulted in an indictment for 1967 and subsequent years. If Sanford Katz's system had been used,

then it is at least possible that no indictment would have arisen at all on these stale checks since all of them would have been written off during the regular audit. Alternatively, and more reasonably, the jury might have believed that Mr. Nathan had been misled by *both* Sanford Katz and Mr. Katzman and that Mr. Nathan could not be found guilty.

36. In this regard it is also very interesting to note that another Joseph Katzman affidavit, dated January 11, 1974, (Exhibit 13) clearly contradicted Sanford Katz's statements regarding who worked out the arrangement for reversal of stale checks with the I.R.S. While Sanford Katz blamed Katzman from the witness stand, the latter, in his affidavit, clearly pointed the finger at Sanford Katz. It would appear, at the very least, that this dispute could have been utilized for Mr. Nathan's benefit but regrettably nothing was done with it and Mr. Nathan was again left carrying the burden of the accountant's errors and disagreements.

37. To compound the foregoing problems for Mr. Nathan is the fact that just three days before the trial he had an emergency eye operation for a "detached retina". As a result of that surgery, he was undergoing discomfort throughout the trial and was not permitted to read nor was he capable of reading. His doctor had given him instructions (see Exhibit 14) to the foregoing. Mr. Bender had been advised of this before the trial[5] and during the trial numerous references to the fact that Mr. Nathan was suffering eye problems and post-operative effects were made. These medical problems further incapacitated Mr. Nathan. He was weakened in his ability to make his points clear to counsel and to emphasize his right to make

[5] Mr. Nathan had in fact requested Mr. Bender to obtain a trial adjournment because of his operation, but Mr. Bender advised him that without a stronger letter he did not believe he could get an adjournment.

certain decisions at the trial—e.g. his right to take the stand; his right to call witnesses. Further, he was hampered in his ability to discern the problems and conflicts at the trial by his medical problems. While even a person in full health cannot perceive the problems which occurred at this trial or overcome his attorney's trial decisions, the situation becomes even more difficult or impossible for someone who is not physically well.

38. As a further detriment to obtaining a fair and complete trial, Mr. Nathan's visual infirmity required him to sit at the defense table with his one eye covered or his head bowed over the table, for much of the trial. (See Baltimore affidavit Exhibit 5.) From this unusual behavior the jury could well have believed that Mr. Nathan acted suspiciously or in a guilty manner.

39. While I do not believe it is necessary to illustrate or amplify on the impact of the foregoing trial impediments on the jury, there is some evidence that the verdict at trial was not one based on a fair and impartial consideration of the facts. The verdict itself indicates that the jury had substantial difficulties in understanding and analyzing the case. The logical inconsistency of a guilty verdict on the first four counts and no verdict on the last four counts is some evidence of this. The impact of presenting a complete defense case on the jury would, no doubt, have been significant.

40. Furthermore, on the last day of the trial, after the jury had been dismissed, the defendant's daughter—Bonita Nathan—heard a member of the jury (believed to be Mrs. Black) say that "they just convicted an innocent man" and other words to this effect. Bonita Nathan has set forth in her affidavit, annexed hereto as Exhibit 15, more fully what she heard and what she recalls having been overheard by another courtroom spectator (one unrelated to defendant in any way). All of this tends towards the conclusion that if the jury had received some substance in

a defense case the verdict would probably have been an acquittal.[6]

41. This is more than a petition to vacate judgment. It is also an application to extend bail at this time until the defendant has a full and fair opportunity to develop and prove more facts relating to this application. I believe the facts shown in this petition alone warrant a new trial. Nevertheless, if this Court wishes to give Mr. Nathan every opportunity to prove that his constitutional rights were denied him then he must be granted a plenary hearing on the issues raised herein. Until such hearing is had, he should not be incarcerated for there is a great likelihood that he is innocent and that he did not receive the type of fair trial with counsel to which he is entitled.

42. Mr. Nathan is a 64-year-old businessman, living with his family, who has no prior record of convictions. By no stretch of the imagination is there any danger to the community nor is there any risk of flight in this case. Since the indictment he has been free on his own recognizance and has properly litigated his defense through the judicial system. Under the appropriate standards of the Bail Reform Act, 18 U.S.C. § 3141 *et seq.*, he meets all the requirements for continuance on bail. Nor do I believe that it can be said that the issues he raises in this petition are frivolous or without merit. *In the event this Court has any reason to believe additional security should be*

---

[6] In addition to the above events, there was also an unrelated incident during the jury's deliberations which may have substantially influenced the jury and deprived Mr. Nathan of his right to a fair and impartial verdict. The incident involved an approach made to a juror—Mrs. Shapiro—by a man who was a spectator in the trial. This incident is reflected in the record. (See transcript, pp. 627-632, Exhibit 16.) It was this incident which resulted in the request for a partial verdict at the end of the first day of the verdict. It will be recalled that the partial verdict on the first days was for guilt on four counts and no verdict was reached on the second day of deliberations.

required from Mr. Nathan, I am advised that he is prepared to post any reasonable bail.

43. It should also be noted that there is still pending a petition for writ of certiorari.

44. In cases such as this it is always the initial act of incarceration which is most traumatic to an individual, his family and his community. Once that takes place, it can never be undone. If Mr. Nathan is entitled to any relief from judgment and sentence then he should most certainly not be required to go to jail now. All of his rights (and all of the wrongs which he has suffered) will to a large degree become moot once he begins to serve his sentence.

45. In connection with a hearing on this petition, it is requested that Mr. Nathan be given limited discovery rights in two areas: 1) an opportunity to explore the conflict issue by discovery of Mr. Katzman, Mr. Bender and any other person who may have knowledge of the facts and circumstances surrounding this dual representation; 2) an opportunity to obtain the jury list and the right to interview the jury regarding any irregularity in the verdict based on the incidents cited previously herein.

46. No prior application under 28 U.S.C. § 2255 has been made.

/s/ Steven Thal
Steven Thal

(Subscription Omitted in Printing)

APPENDIX II

Affidavit

State of New York
County of New York ss.:

Jack Nathan, being duly sworn, deposes and says:

1. I am the defendant in the matter of United States v. Nathan, 74 CR 377.

2. In about November, 1971, I retained Joseph Katzman, C.P.A., to take charge of my accounting affairs during the pendency of an I.R.S. audit. I felt that my regular accountant—Sanford Katz—had been too slow in concluding this audit. Mr. Katzman immediately became the key man representing me and he took charge of all aspects of the audit and the preparatory work. In doing so, he soon discovered that Sanford Katz had fallen years behind in keeping my books and filing my tax returns. When he uncovered this, Sanford Katz admitted all of his wrongdoing to Mr. Katzman. When I learned of this, I immediately wanted to file criminal and other charges against Sanford Katz but Mr. Katzman persuaded me not to do so. When Mr. Katzman learned of these wrongdoings, he prepared an affidavit for Sanford Katz in which Katz accepted the burden of his misdeeds.

3. At no time during the period that Mr. Katzman represented me did he ever disclose to me that he had any problems with the I.R.S. (or any other government agencies). Even when he resigned the engagement he did not tell me of any personal legal problems. Furthermore, he never advised me that he retained Louis Bender, Esq. on his behalf.

4. Mr. Katzman withdrew from this engagement when he learned that the audit had been transferred to the intelligence division of the I.R.S. He never explained his reasons for withdrawal. In fact, I only learned that Special Agents had become involved when my bank advised me of subpoenas for my accounts.

5. After Mr. Katzman resigned I hired Mr. Ted Mate to represent me before the I.R.S. Mr. Mate took complete charge of my case.

6. When I first retained Louis Bender, Esq. as my counsel I advised him that I felt Messrs. Katzman and Mate, as well as myself, would be the key witnesses in my own defense. Throughout the course of his representation of me—up to and including the trial—I insisted on taking the witness stand and on calling both Messrs. Katzman and Mate as witnesses.

As evidence of this I submit herewith photocopies of certain pages of a notebook which I kept during the course of the trial. It is readily apparent from my notes in this book (which I discussed daily with Mr. Bender during the trial) that I wanted to call the above witnesses.

7. When I first retained Mr. Bender he assured me that Mr. Katzman would be a good witness on my behalf. Only during the trial did he seem to back away from this decision.

8. At no time before the eve of trial did Mr. Bender indicate to me that he had ever represented Mr. Katzman (directly or indirectly) or even that he ever heard of Mr. Katzman except as related to my case.

9. During the pre-trial preparation of my case, Mr. Bender asked me about the Subchapter S status of Nathan, Nathan & Nathan Ltd. I advised him that I knew nothing of these matters and that any change in the status of the Company was the doing of Mr. Katzman and that Mr. Katzman initiated these conversations and gave me whatever instructions were necessary in this regard.

10. Only on the eve of trial (I believe it was the night before the trial opened) Mr. Bender told Mr. Baltimore and myself that he represented a client of Mr. Katzman in an "unrelated matter" and that he could not disclose the details. It was my understanding that Mr. Katzman was *not* the subject of the other matter and that he was only in-

volved as an accountant for the other client. In subsequent discussions with Mr. Baltimore he has confirmed that this was also his total understanding of Mr. Bender's disclosure that evening. Neither of us had the slightest idea before or during the trial that Mr. Bender represented Mr. Katzman.

Furthermore, Mr. Bender never advised us that Mr. Katzman was in any way involved in a criminal investigation.

11. At the conference before Judge Bonsal on the first day of the trial when I was asked to consent to Mr. Baltimore's cross-examining Mr. Katzman, I never understood the full nature of the problem. I believed that there was some legal reason for substituting Mr. Baltimore for this one part of the trial and nothing more.

12. During the trial I argued with Mr. Bender daily regarding my desire to take a more determined posture at the trial. I told him that I wanted to testify and that I wanted other witnesses called. He rejected these approaches and told me "not to do my own surgery." My trial notes referred to previously and which are annexed hereto, should serve as ample evidence of my position at trial.

13. My general presence and resolve at trial were substantially impaired by the fact that I had undergone painful eye surgery for a "detached retina" a few days before the trial began. I had even asked Mr. Bender to obtain an adjournment of trial because of my discomfort and my doctor's instructions not to read or engage in strenuous activity. No doubt this physical impairment diminished my ability to participate in and contribute to my defense.

14. In a recent telephone conversation with Mr. Katzman he advised me that Mr. Bender had done a very good job on his case and that everything had turned out very well for him.

/s/ JACK NATHAN
Jack Nathan

(Subscription omitted in printing)

Sandy must be called back to testify—

5. That legal secy., Mrs. Schwartz, of Goldstein & Goldstein, attys. (dark glasses) bothers me.

6. Sandy told me had professional insurance—also confessed to Katzman that he had lied to me about it. All employees insured for $50,000 blanket.

7. Why wasn't jury told checks for $80,000 were drawn —(interest added)

8. No checks are ever stop payment—even if charged back to income.

9. Sandy stalled Kern for about 1 yr.—kept lying to me.

10. Didn't I tell grand jury gov't getting after the person that was mugged, raped and not the mugger and rapist?

Katzman to take stand!

11. When Katzman called me and told me about Sandy, that he had confessed all to him, I went to Katzman's office, called Katz's wife to find out where Katz was. She told me not to get excited, that she would locate Sandy. Sandy called me at Katzman's office within 20 min. and pleaded with me not to hurt him if he would come into Katzman's office.

12. Katzman told me *not* to turn Sandy in. He reasoned that the fair thing to do was to have Sandy get things in order and file all taxes.

Katzman's conversation with Kerr re outstanding checks.

13. Question—How come Katzman, who evidently at that time had tax trouble himself, took my power of atty. to handle me? I only found out about Special Agent transfer from Chase Bank—When I called Katzman he admitted he neglected to tell me. (P.S.—That's why he never billed me) (Katzman did nothing for me) I called Katzman for 10 days, he never returned call—finally got him in ——??— and met him in Lombardi Restaurant and his wife.

14. Ted Mate on Stand re Katz incompetence and that I told him I wanted to turn Katz in. (and file on Schneider harassment)

APPENDIX III

Affidavit

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

RICHARD L. BALTIMORE, JR., being duly sworn, deposes and says:

1. I am an attorney at law admitted to practice in the State of New York and in the United States District Court for the Southern District of New York.

2. During my years of practice, I have been an Assistant Corporation Counsel for the City of New York, a director of the American Arbitration Association, a member of the Westchester County Grievance Board, a member of the Committee on State Courts of Superior Jurisdiction of the Association of the Bar of the City of New York and am an Acting City Judge for the City of New Rochelle.

3. I have been a long time friend of Mr. Jack Nathan and as such, he requested my participation at his trial before this Court.

4. As a judge, I had to get special permission in order to appear at the trial, which permission I obtained. Nevertheless, I attended the trial in my capacity as Mr. Nathan's friend and confidant but I was not there as his trial counsel. To the best of my recollection, I was not at the trial more than fifty percent of the time, if that.

5. I can confirm that during the time I was there, there were defense witnesses who were available to testify. Further, Mr. Nathan always wanted to take the stand in his own defense and to have Mr. Joseph Katzman and Mr. Ted Mate called as witnesses.

6. I first learned of a possible conflict of interest on the part of Mr. Bender and a problem regarding his representation of Mr. Nathan on the evening before the trial began.

At that time, Mr. Bender advised Mr. Nathan and myself that he represented a client of Mr. Katzman, which client had certain difficulties with the I.R.S. We were advised that Mr. Katzman was in some way involved with that matter.

Mr. Bender did not advise us that Mr. Katzman was the client nor did he advise us that he represented Mr. Katzman in a criminal investigation.

7. At the conference with Judge Bonsal on the first day of the trial when the Katzman cross-examination problem arose, neither I nor Jack Nathan understood that the problem went any further than simply that of cross-examining Mr. Katzman. We never understood that any greater conflict or problem existed.

8. I can also confirm that Jack Nathan had eye surgery a few days before the trial and that he requested Mr. Bender to obtain an adjournment of the trial. Mr. Nathan sat through the trial with his hand covering his eye and with his head bent down over the defense table. He acted this way because of the discomfort arising from the surgery.

I believe that these actions on the part of Mr. Nathan made a bad impression on the jury and might have caused the jury to think that he was acting deviously or with a sense of guilt.

/s/ Richard S. Baltimore, Jr.
Richard S. Baltimore, Jr.

(Subscription omitted in printing)

APPENDIX IV

Trial Transcript—United States of America v. Jack Nathan, 74 CR 377

The Court: May I see counsel in the robing room for a minute.

(In the robing room.)

The Court: I thought this might be a good time to get into this problem which the government has raised.

I understand there is some witness.

Who is this witness?

Mr. Wohl: Mr. Katzman, Joseph Katzman, your Honor.

The Court: And you don't know whether you are going to call him or not but you may want to call him on rebuttal and as I understand it, is it?

Mr. Bender: Who was at some time an attorney for Mr. Katzman.

Mr. Wonl: That's right.

The Court: And the question is whether there is a conflict of interest here, should he testify, is that right?

Mr. Wohl: I think that it is just a question, as Mr. Bender explains it to me, making sure that Mr. Nathan understands that and is agreeing to waive——

The Court: If, assuming, it happens.

Mr. Wohl: That's right.

The Court: Poor Mr. Nathan, he has to rely on Mr. Bender. Do you have any problem with this, Mr. Nathan?

The Defendant: No, your Honor.

The Court: If the government says, if this gentleman, Mr. Katzman should testify, as far as any privilege that might exist between you and Mr. Katzman, you waive that?

MR. BENDER: Judge, that's not the question. The question is not privilege.

THE COURT: What is it?

MR. BENDER: There are two problems. One is, Mr. Nathan's right under the Sixth Amendment to counsel. The second problem that you face as a result of that Sixth Amendment, is my representation of Joseph Katzman, which antedates my being retained by Mr. Nathan, in a totally unrelated matter.

Now, if Mr. Katzman testifies as a witness, obviously, I can't disclose any confidential communication given to me by Mr. Katzman, but at the same time, Mr. Nathan is entitled to my complete loyalty and I am placed in a position where he could very well feel that my representing Katzman in a different case, he is getting divided loyalty, so to speak.

I have explained this to Mr. Nathan, and Mr. Wohl said he doesn't know whether he will call him, at the present time he has no intention of calling him but he may call him at rebuttal.

To overcome that problem, Mr. Nathan is willing either to permit, which I prefer, Judge Baltimore to cross-examine——

THE COURT: I would prefer that too. I think that would make a lot of sense. You have never had Mr. Katzman.

MR. BALTIMORE: No, I have not.

THE COURT: I think that makes a lot of sense.

MR. BENDER: And yet at the same time, I think for Mr. Nathan's protection and for all concerned, since this Fifth Circuit Court case, United States v. Garcia, which I gave Mr. Wohl and Mr. Rankin, the Fifth Circuit holds in a different situation, holds that the defendant has his Sixth Amendment rights under these circumstances, I felt Mr.

Nathan should do this under the circumstances so that I am not criticized by your former Bar Association which you were the head of and my American Bar Association, the Circuit Court of Appeals, if there is an conviction.

THE COURT: Mr. Nathan, is this clear to you, talking about the Sixth Amendment, right to counsel?

THE DEFENDANT: Your Honor, I have complete confidence in Mr. Bender and Judge Baltimore. Whatever they do, I am one hundred percent in accord.

THE COURT: And if they say to you in doing this, you might be waiving the Sixth Amendment privileges, is that agreeable to you?

THE DEFENDANT: I will do anything they say, your Honor.

THE COURT: The only thing, tell Mr. Katzman not to talk to Judge Baltimore. Will you warn him about that, the government?

MR. BENDER: I have spoken to Mr. Katzman yesterday, and told him I was disclosing the question and I asked him if he has any objection to my still representing Mr. Nathan under these circumstances, and he said absolutely none. But, I think we should get from Mr. Nathan, with all due respect to Mr. Nathan's answers, I think we should get from Mr. Nathan an expressed statement, not that he is following Judge Baltimore and me blindly, but that he understands the situation, that he agrees that he wants me——

THE COURT: Now you see what lawyers are like, Mr. Nathan. I think that is a point. You do understand the situation.

THE DEFENDANT: Unfortunately I know lawyers and I love them but I don't like accountants.

THE COURT: I can understand that too. But the point is, totally apart from your reliance on Mr. Bender and Mr.

Baltimore, I want to ask you do you understand the situation?

THE DEFENDANT: I do.

THE COURT: Regardless of your reliance on them you do waive any right that you may have, is that correct?

THE DEFENDANT: Yes, your Honor.

MR. BALTIMORE: I want to ask for the record try to keep referring to me as mister. If this record should go to the Circuit Court I don't want my friend to say anything. Try to keep it mister.

THE DEFENDANT: I know the judge for many years and I keep calling him judge.

THE COURT: The point is, it is a question for the jury. It is not necessarily that being a judge may help you. It might even help you because there is so much of judges. Let's keep it to Mr. Baltimore.

THE DEFENDANT: Yes, your Honor.

THE COURT: Thank you. Anything any of you can do to move this along I will help you.

(Adjourned to October 2, 1975, at 10 A.M.)

APPENDIX V

Transcript of Ruling by Honorable Dudley B. Bonsal Denying Bail Application

THE COURT:

My reasons are: I remember this trial very well. I remember that Judge Baltimore was there also as retained counsel for Mr. Nathan and I remember that he did cross examine the witnesses and there was some problem which was happily resolved during the trial.

It seems to me Mr. Nathan waived any rights he had. He took an appeal, and there is nothing you say in your papers that is not or should not have been known to him at that time.

It has gone up. Now it is in the Supreme Court. You have a question of whether there is jurisdiction anyway.

It seems to me a little unusual that this should be started —no reflection on you. I understand your firm has only been in for two weeks. There has been a lot of attorneys in this case—that this should be raised the day before he is supposed to surrender.

Those are my reasons. You can take it up.

APPENDIX VI

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited nor otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 76-8458

JACK NATHAN, *Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

Before: HON.: HAROLD R. MEDINA, ROBERT P. ANDERSON, MURRAY I. GURFEIN, *Circuit Judges.*

New York, October 13, 1976.

JUDGE GURFEIN:

But let me ask you this. How do you get here on a 2255 when you've got certiorari in the Supreme Court? I mean you're applying . . .

MR. LEWIN:

Well, we think it's a memorandum that Mr. Youtt has prepared. We think that there are cases which justify that. The interesting things were [thing is, we're] caught in an impossible dilemma here. On the one hand, we're trying to bring before the court at the very earliest time, an important constitutional crime [claim] which developed subsequent to trial. I was representing Mr. Nathan on the appeal. There was a question about a possible conflict of interest. He was represented by a well-known counsel on the court below—there was a matter that I must say—there was some reluctance to inquire into—finally, counsel was

asked directly questions regarding that matter—as developed that there was a conflict between his representation of this defendant and his prior representation on a principle . . .

JUDGE GURFEIN:

But isn't it a general rule that . . . Turn that down just a little, will you, Mr. Clerk . . .

JUDGE GURFEIN:

Isn't it a general rule that when the case is in the Supreme Court on an application for a writ we've lost jurisdiction?

MR. LEWIN:

We think in terms of release on bail—we think that's an impossible dilemma. If the court were to grant us—were to grant the defendant release on bail pending disposition of a petition for certiorari, then it would be fair to say—well, all right, once that's disposed of, if the court denies it, then Judge Bonsal can determine whether he should be continued on bail pending a very serious constitutional 2255 applicant—application—but to say to him on the one hand because the court on direct appeal here said it would not any longer stay the mandate pending certiorari in the Supreme Court, that he must begin to serve his term of imprisonment—and on the other hand, that the 2255 is premature and therefore bail incident to the 2255 would be denied, it seems to me necessarily works an injustice.

JUDGE GURFEIN:

It is a catch 2255.

MR. LEWIN:

Exactly—right—maybe that's the best way to put it. And what we're saying is we have now discovered by response

to me at the end of August from the counsel who represented Mr. Nathan at the trial that there was this serious conflict of interest which we think affected whether Mr. Nathan testified. The extraordinary thing about this case is an income tax evasion case which turns entirely on the defendant's state of mind. What did he know? And yet peculiarly enough although he testified before the grand jury, he did not testify at the trial of this case and no defense was put on whatever. It subsequently develops that the witness who would have testified in rebuttal if the defendant had testified and who would contradict him had been represented by his trial counsel. Now this trial counsel raised this question with the government, with Mr. Wohl, who brought before Judge Bonsal on the first day of trial—the defendant didn't know about this conflict under the affidavits that had been submitted until the eve of trial—on the first day of trial it was raised before Judge Bonsal in the context not of this rebuttal witness will say something that contradicts with the client's testimony and therefore there'll be difficulty in my advising him whether he should take the stand, but in the context of there is a rebuttal witness whom I have represented and I cannot cross-examine him. Can my co-counsel examine him? In that context the defendant, and here it's obvious ———————— he had just undergone serious eye surgery, was there in court, under some disability and the defendant says, well all right, I'll go along with anything my counsel says.

JUDGE GURFEIN:

Why don't you make a motion in the Supreme Court to remand to us to consider this question and add to the record? I mean, that's been done.

MR. LEWIN:

Well, if Your Honors think that that's the proper procedure I would just like to have

JUDGE GURFEIN:

I don't know, I'm not giving advice on law, but it seems to me that when you have a situation that arises after the Court of Appeals has rendered a decision which you say was not in that record, I think there's a way to apply to the Supreme Court, and saving your time on the certiorari application and asking for some kind of remand to fill out the record. Is that right?

JUDGE ANDERSON:

You can't do it here now, we haven't got jurisdiction.

JUDGE GURFEIN:

That's right.

MR. LEWIN:

Well,

JUDGE :

It's in the Supreme Court when you get your

MR. LEWIN:

Your Honors, I would do that tomorrow if we could have a

JUDGE GURFEIN:

As a matter of fact it's done in motions for new trial occasionally. It was done in the Rosner case where an application was made to the Supreme Court in which certiorari was pending asking the court to remand—hold the case until the district judge could determine the facts involved in the motion on trial, which they did—which they did, and then we got jurisdiction again on an appeal from the district judge. That's the only way to do it.

MR. LEWIN:

Well, Your Honors, if that—could we then have three days. I will file an application with the Supreme Court and until such time as the Supreme Court acts on that application, and have the surrender stayed pending that disposition.

JUDGE :

I'd give him three days.

JUDGE :

Yes, yes, yes.
unclear conversation

JUDGE GURFEIN:

Do you want to say something, Mr. Wohl?

MR. WOHL:

I'm opposed to three days.

JUDGE GURFEIN:

You are.

MR. WOHL:

Yes.

JUDGE GURFEIN:

Well, I guess the Republic is in flames but go ahead and tell us why.

MR. WOHL:

I think the nub of our position, Your Honor, is that there is absolutely nothing that is new here. I think that Your Honor's mentioning of the Rosner case is an inter—was

appropriate because there you had some very new information that really made a vital interest in that defendant's appellate rights.

JUDGE GURFEIN:

Don't say that or we'll withdraw our opinion in which you won.

MR. WOHL:

But I would—at least raised a substantial question. Here you don't have that. Here this very question of potential conflict of interest was raised at the very beginning of the trial. It was explained to the trial judge and the normal conflict that one might expect was entirely eliminated.

JUDGE GURFEIN:

I think you misunderstand what we said. If we give three days for the filing of a petition; as Judge Anderson indicated, we have no authority we think to tell the district judge not to ———— Your Honor, would you like to help us out, and if he turns him down, he'll be in jail.

JUDGE :

He'll be a little worse off.

MR. WOHL:

He's supposed to surrender at 4:00 this afternoon.

JUDGE GURFEIN:

And suppose he surrenders at 6:00 tomorrow. Would that destroy anything of importance?

MR. WOHL:

I can't say it would destroy anything——

JUDGE GURFEIN:

That's what I meant when I said the republic isn't in flames.

MR. WOHL:

We've had a number of little adjournments here and we think that at some point he's got to start

JUDGE GURFEIN:

At some point, which is three days from now unless he gets a stay from the Supreme Court—that's only reasonable, don't you think?

MR. WOHL:

All right.

JUDGE GURFEIN:

On second thought it's reasonable, okay?

MR. WOHL:

Fine.

JUDGE GURFEIN:

All right, we will order the surrender to be put off for three days, which is when—let's get a clear date for the time of surrender, subject only to an intervention by the Supreme Court of the United States or a Justice thereof.

JUDGE :

That would be Monday, wouldn't it. That would be the 16th.

JUDGE GURFEIN:

16th. All right.

———————:

That's Saturday.

———————:

That would be on the weekend, Your Honor.

JUDGE GURFEIN:

No. All right. 18th. Let's say, Monday the 18th. All right. All right—don't plead any more or we may take back the three days.